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## LOYALISTS IN WAR, AMERICANS IN PEACE: THE REINTEGRATION OF THE LOYALISTS, 1775-1800

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ABSTRACT OF DISSERTATION

Aaron N. Coleman

The Graduate School

University of Kentucky

2008

LOYALISTS IN WAR, AMERICANS IN PEACE:  
THE REINTEGRATION OF THE LOYALISTS, 1775-1800

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ABSTRACT OF DISSERTATION

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A dissertation submitted in partial fulfillment of the  
requirements for the degree of Doctor of Philosophy in the  
College of Arts and Sciences  
at the University of Kentucky

By  
Aaron N. Coleman

Lexington, Kentucky

Director: Dr. Daniel Blake Smith, Professor of History

Lexington, Kentucky

2008

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## ABSTRACT OF DISSERTATION

### LOYALISTS IN WAR, AMERICANS IN PEACE: THE REINTEGRATION OF THE LOYALISTS, 1775-1800

After the American Revolution a number of Loyalists, those colonial Americans who remained loyal to England during the War for Independence, did not relocate to the other dominions of the British Empire. Instead, they sought to return to their homes and restart their lives. Despite fierce opposition to their return from all across the Confederation, their attempts to become part of a newly independent America were generally successful. Thus, after several years of struggle most former Loyalists who wanted to return were able to do so.

Various studies have concentrated on the wartime activities of Loyalists, but few have examined their post-war return to America. This dissertation corrects this oversight by tracing the process of the reintegration of the Loyalists. It analyzes this development from a primarily American perspective, although former Loyalists are consistent members of the story. The work considers the emotional significance families and friends played in affecting the desire to return. On the American reception of their former enemies, this work explains that the nascent idea of federalism required the process to occur on a state-by-state basis. Also important to Loyalist assimilation was a critical shift from the republican ideological belief in the necessity of virtue to the survival of the community to a growing awareness, tolerance, and respect for individual rights, for those who held views perhaps inimical to the polity. Critical to the process of reintegration was a jurisprudential transformation from an older, English common law understanding of the law to a more modern view that law is commanded by a sovereign. It is my contention that popular sovereignty drove this transformation and allowed for the wartime legal persecution of the Loyalists, but in order for former Loyalists to peacefully co-exist, popular sovereignty had to be reined in by the very same and new legal ideology that it had helped develop. Finally, the process of reintegration required Americans to permit citizenship to their former traitors. Thus, the dissertation closes by showing the procedure former English subjects underwent to renounce their allegiance to England and become republican citizens.

KEYWORDS: Loyalists, American Revolution, Federalism, Constitutionalism,  
Republicanism

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THE REINTEGRATION OF THE LOYALISTS, 1775-1800

By

Aaron N. Coleman

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DISSERTATION

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The Graduate School  
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*To Emily, Alex, and Lorelei*

## ACKNOWLEDGEMENTS

Although I feel considerable relief because I have finally completed this work, one emotion trumps it, gratitude. So many people have been encouraging and helpful in the course of this project. Because of these people, their words of encouragement, critiques on my writing and thoughts, pointing me to the right sources as well as just letting me vent my frustrations or elations, I am able to say ‘I’m done.’ I offer them all a sincere thank you.

I must first thank the late (and great) Dr. Lance Banning. His first book, *The Jeffersonian Persuasion*, convinced me as a sophomore in college that Revolutionary America was the area of history I wanted to study. Being one of his students will always be one of my greatest honors. I had just started the initial research of this project when he passed away, leaving a professional and personal void. I can only hope that this work would have made him proud.

I honestly could not say thank you enough to Dr. Dan Smith, my mentor and friend. That he would take me as a student after Dr. Banning’s passing, despite having his own students and work to attend testifies to his generosity and kindness. He has seen me through every step of the writing process, providing the right words, encouragement, and wittiness at just the right time – even if he never realized it. I would be remiss, too, if I did not give a special thank you to him for his patience as I forced him to use his editing skills to his maximum capacity. Simply put, without him this project would still be a pile of research notes.

The members of my dissertation committee have been helpful in so many ways. Being a Teaching Assistant for Dr. Ireland for a number of semesters exposed me to one

of the best minds I know. His acerbic wit was something I always enjoyed and looked forward to. Dr. Harling provided the necessary guidance in my desire to understand eighteenth-century England. Without it, I could not have fully understood why some colonial Americans would have given so much to remain loyal. Professor Paul Salamanca from the University of Kentucky Law School gave great comments on Chapter 5 of this work and pointed me to sources that I would have otherwise overlooked. He has gone far and beyond the call of duty. Additionally, Dr. Jane Calvert joined my committee only as I was starting to finish. Yet, she provided such timely and penetrating comments that I will be answering them for the foreseeable future.

A very special thank you is owed to Dr. Robert M. Calhoon of the University of North Carolina at Greensboro. His enthusiasm about my work has been a huge motivator, especially during those moments when I thought I would never finish. I am proud to call him a friend and I am so happy that the University of Kentucky Graduate School awarded us the Myrle E. and Verle D. Nietzel Visiting Distinguished Faculty Award so he could be an official member of my committee.

In the History Department of the University of Kentucky, Tina Hagee has been the most helpful of people. She always seems to have the answers and gives me the details I need to finish my non-classroom assignments. Rachelle Green has been helpful by providing information about deadlines and other things absent-minded graduate students seem to forget. Furthermore, The Graduate School of the University of Kentucky, along with awarding me the Visiting Distinguished Award, also provided funding in granting me a Dissertation Year Fellowship, which allowed me to devote an entire year just to this work.

There are a number of other people that I deserve my thanks. Dr. Thomas Mackey at the University of Louisville has remained a great friend and has provided comments on a large portion of this work. His deep knowledge of constitutional and legal history has been a great influence on me. Mike Schwartz is probably the most knowledgeable classmate of the Revolutionary Era I know. I have relied on his critical and sharp mind as a sounding board for many of my thoughts. If Mike thinks it's a crazy idea, it probably is. David Hollingsworth has been about as good a friend as anyone has ever had. A true brother-in-arms in so many areas beside history, his humor and just all-around decency has been one of the best things to come out of my attending the University of Kentucky.

Finally (but not least!) is my family. To say my parents, Jerry and Sue, have been encouraging would be a gross understatement as they have been the most positive force throughout my entire life. My love of history originates with my Dad's recounting of stories about my grandfather's service during World War II. My mother's many sacrifices for me and my siblings went unnoticed as a child, but they are recognizable now and I am eternally grateful. I strive to always make them proud. My older brother, Brian, has given his support when he could and has been a big help in taking me away from Revolutionary America and concentrating on more important things, like UK Basketball. Millicent, my younger sister, has been very helpful in the latter stages of this project by providing baby-sitting that allowed me to get more work done or let my wife and I to get a much-needed night on the town.

The two greatest sources of joy in my life are my children, Alex and Lorelei. We adopted Alex as I started the writing stage of the dissertation and Lorelei was born as I

was finishing. While they have tried their absolute best in keeping me from finishing this project, every second I have spent with them and not the eighteenth century has been worth it. I would gladly do it again. But the greatest thanks of all are reserved for my wife, Emily. No one has provided more encouragement, understanding, and love than she. How she juggles her demanding job with being the greatest of mothers and the best of wives all the while demonstrating a near saint-like tolerance for my sloppy office, occasional late nights, and getting lost in the American Revolution is beyond me. Her love sustains me and I only hope she knows how much I love her. It is to her and my little ones that I dedicate this work.

## TABLE OF CONTENTS

Acknowledgements.....	iii
List of Files .....	ix
Chapter One: Introduction: Fitting Reintegration in the Picture of Revolutionary America .....	1
Chapter Two: In the Midst of Civil War: Family, Friends and the Emotional Aspects of Reintegration.....	14
Patriot Treatment of Loyalist during the War.....	15
Loyalist Women.....	30
The Emotional Importance of Friendship in Revolutionary America .....	38
Friendships between Loyalists.....	52
Chapter Three: The Treaty of Paris, the Confederation, and the States: The Issue of Federalism and the Reintegration of the Loyalists .....	56
Federalism and Negotiating the Treaty of Peace .....	66
Negotiations Begin.....	70
Chapter Four: Nationalists v. State Sovereignists: Debating the Treaty of Paris, 1783-1790.....	84
American Reaction to the Treaty in Congress, 1783 .....	89
States react to the Treaty, 1783: State Sovereignists Seize the Initiative .....	97
The Reaction Continued, 1784 .....	106
The Nationalists Counter-Argument.....	109
Debating the Treaty in New York: <i>Rutgers v. Waddington</i> and the Phocion Letters. ....	115
The Treaty in the Courts, 1785-1790.....	123
Chapter Five: Republicanism, Virtue, and Individual Rights: The Ideological Struggle to Reintegrate the Loyalists, 1776-1785 .....	134
Chapter Six: From Custom to Command: The Enactment and Repeal of Anti-Loyalist Legislation, the Limits of Popular Sovereignty, and the Reintegration of the Loyalists, 1774-1790 .....	174
Anglo-American Conception of the Law to 1774.....	175
Development of Parliamentary Superiority and its Rejection by Americans .....	182
The American Development of Popular Sovereignty .....	187
The Anti-Loyalist Legislation.....	191
Loyalists and Patriot Opposition to the Anti-Loyalist Legislation .....	209
Chapter Seven: From Traitor to Citizen: the Meaning of Allegiance.....	219
English Development of Treason.....	220
Development of American Citizenship.....	252

Chapter Eight: Afterword: Reintegration in Historical Memory .....	272
Bibliography .....	281
Vita.....	314



## List of Files

Loyalists in War, Americans in Peace: The Reintegration of the  
Loyalists, 1775-1800.....(1.4 MB)

## Chapter 1

### Introduction:

#### Fitting Reintegration in the Picture of Revolutionary America

The American Revolution was also a civil war. While historians acknowledge this fact, they often fail to grasp its implications. This oversight has resulted in the marginalization of Loyalists to the point where they have remained a noted part of the revolution but rarely a fully-explored topic. In the past forty, years serious attempts have been made to correct this omission by raising the visibility on Loyalism's importance in the era. Still, despite knowing more about the motivations, socio-economic makeup, actions, and ideology of Loyalists than ever before, one aspect of their story remains to be told: their post-war reintegration into American society. This dissertation will tell that story. It argues that the reintegration of the Loyalists was a major episode of the post-war years and encompassed a multi-faceted process of social, legal, and constitutional issues.

As Robert Calhoon pointed out in a notable essay on Loyalist reintegration, there are several ways to examine the topic.<sup>1</sup> One is to study several prominent Loyalists who either did not leave when the British evacuated America, returned after the War, and/or focus on their experiences as they adjusted to life in an independent America. This case study approach has been employed to explore the lives of such well-known Loyalists as Tench Coxe, William Samuel Johnson, and Peter and Henry Van Schaack.<sup>2</sup> A second

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<sup>1</sup> Robert M. Calhoon, "The Reintegration of the Loyalists and Disaffected" in Jack P. Greene, *The American Revolution, Its Character and Limits* (New York: New York University Press, 1987) 51-74.

<sup>2</sup> Jacob E. Cooke, *Tench Coxe and the Early Republic* (Chapel Hill: University of North Carolina Press, 1978), especially chapters 2 and 3; Elizabeth McCaughey, *From Loyalist to Founding Father: The Political Odyssey of William Samuel Johnson* (New York: Columbia University Press, 1980); and Henry C. Van Schaack, ed., *Memoirs of the Life of Henry Van Schaack* (Chicago: A. C. McClurg and Company, 1892) and *The Life of Peter Van Schaack, LL.D.* (New York: D. Appleton and Co., 1842).

approach examines the return of the Loyalists on state-by-state basis, probing the broader incidents of returning Loyalists, as well as detailing how individual states and their citizens accepted repentant Loyalists back into the community. While there have been studies on war-time Loyalists from virtually every state, only one, David E. Maas' doctoral dissertation on Massachusetts, has focused exclusively on reintegration.<sup>3</sup> Jackson Turner Main's study of political parties before the constitution, as well as Mary Beth Norton's assessment of exiled Loyalists and Robert Lambert's detailed account of South Carolina Loyalists, also provide some discussion on Loyalist re-assimilation.<sup>4</sup> While helpful in providing a sketch of the process of reintegration, none provide a comprehensive examination of the larger picture of Loyalist assimilation.

While these two approaches are valid and have produced fruitful studies, this dissertation opts for a third method. It explores Loyalist reintegration on a continental level and attempts to reveal the commonalities of the process. Because I view reintegration on such a large scale and expose its generalities, I do not adhere to the regional dimensions of early America that have become so fashionable in recent

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<sup>3</sup> David Maas, "The Return of the Massachusetts Loyalists" (PhD Dissertation: University of Wisconsin, 1972). Among the important war-time studies of Loyalists are Andrew Flick, *Loyalism in New York during the Revolution* (New York: Columbia University Press, 1901); James Starks, *Loyalists in Massachusetts* (Boston: Little, Brown and Co., 1910); Edward A. Jones, *Loyalists of Massachusetts* (London: Oxford University Press, 1930) and *Loyalists of New Jersey* (Newark: New Jersey Historical Society, 1927); Otis G. Hammond, *Tories of New Hampshire in the Revolution* (Concord: University of New Hampshire Press, 1917); Epaphidiotus Peck, *Loyalists of Connecticut* (New Haven: Yale University Press, 1930); Harold Hancock, *Delaware Loyalists* (Wilmington: Delaware University Press, 1940); Wilbur H. Siebert, *Loyalists of Pennsylvania* (Columbus: University of Ohio Press, 1920), *The Tory Proprietors of Kentucky Lands* (Columbus: F.J. Heer Printing, Co., 1919), and "Kentucky's Struggle with Its Loyalist Proprietors," *Mississippi Valley Historical Review* 7 (Sept. 1920): 113-126; Isaac S. Harrell, *Loyalism in Virginia* (Durham, N.C.: Duke University Press, 1926); and Robert O. DeMond, *Loyalists in North Carolina during the Revolution* (Durham, N.C.: Duke University Press, 1940).

<sup>4</sup> Jackson Turner Main, *Political Parties before the Constitution* (Chapel Hill: University of North Carolina Press, 1972); Mary Beth Norton, *The British-Americans: The Loyalists Exiles in England: 1774-1789* (Boston: Little, Brown, and Co., 1972); and Robert S. Lambert, *South Carolina Loyalists in the American Revolution* (Columbia: University of South Carolina Press, 1987).

decades.<sup>5</sup> While these works have broadened our knowledge of early America by concentrating on a particular region, the process of Loyalist assimilation was not a regional phenomenon; it occurred in essentially every state, thus making it a continental wide process. Only one other work, Roberta Jacob Tansman's dissertation on the intellectual reaction to the return of the Loyalists, has considered Loyalist reintegration on a nation-wide scale. Yet, her study was narrow in scope and focused almost exclusively on the diplomatic and intellectual dimension (especially the former), ignoring any other aspect.<sup>6</sup> My dissertation attempts a much more comprehensive approach to Loyalist reintegration that encompasses not only diplomatic and intellectual elements but also key issues involving the personal, legal, political, and constitutional facets of the process. My study, moreover, tries to address Robert Calhoun's plea to historians that whole story of Revolutionary America cannot be fully told if the Loyalists are not included; in fact, it is my hope that this dissertation will also demonstrate the importance of reintegration in the Confederation period as few works on that important period even mention the topic.<sup>7</sup> To address successfully these two historiographical concerns, as well as properly tell the story, the dissertation offers both the Loyalist and American views, although the American side is more prevalent for it was the Americans who had to debate the often complex consequences of the reintegration process.

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<sup>5</sup> For a breakdown of the major works on the separate regions, see Edward Countryman, *The American Revolution*, rev. ed. (New York: Hill and Wang, 2003), 244-249.

<sup>6</sup> Roberta Tansman Jacobs, "The Treaty and the Tories: The Ideological Reaction to the Return of the Tories, 1783-1787" (PhD Dissertation Cornell University, 1973).

<sup>7</sup> Robert M. Calhoun, *The Loyalists in Revolutionary America, 1765-1781* (New York: Harcourt, Brace and Jovanovich, 1973), 500-509; For major studies on the Confederation that do not mention reintegration, see Richard B. Morris, *Forging of the Union, 1781-1789* The New American Nation Series, eds. Henry Steele Commanger and Richard B. Morris (New York: Harper and Row, 1987); Forrest McDonald, *E Pluribus Unum: The Formation of the American Republic, 1776-1790* (Boston: Houghton Mifflin Co, 1965); and Wood, *Creation of the American Republic*. The one work that does look at the issue in some detail is Merrill Jensen, *The New Nation: A History of the United States during the Confederation, 1781-1789* (New York: Vintage, 1950).

This dissertation relies heavily on a variety of primary sources such as newspapers, published and unpublished writings of both Loyalists and Patriots, legislative and judicial records, and legal and political philosophy treatises. Since the work is more about how the Americans reintegrated the Loyalists into society, the majority of these sources is American, although Loyalists supply a significant amount of the material. With these documents, the work builds on the contributions of numerous historians who have studied Revolutionary America, drawing especially on the works of social, ideological, legal and Loyalist historians who have explored the complexities and weighty issues surrounding reintegration.

One topic this dissertation does not expressly address is the social makeup of Loyalists. In part, this is because of the persuasive published research by such historians as William Nelson, Paul Smith, and Wallace Brown, all of whom have demonstrated beyond doubt that Loyalists came from all social strata and professions in colonial America.<sup>8</sup> Loyalist historians have also made something of a hobbyhorse in trying to determine when Loyalists emerge during the period. Mary Beth Norton's assertion that there could be no Loyalists until 1774, when the resistance to England took on its more militant characteristics, is certainly accurate enough in a technical sense; yet, determining when Loyalists emerge may involve more complex issues. Clearly, as Robert Calhoon has shown in the most important work to date on the Loyalists, the social and intellectual antecedents of loyalism were present in the decade before Norton believes they appear.

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<sup>8</sup> William Nelson, *The American Tory* (Boston: Beacon Press, 1960); Paul H. Smith, *Loyalists and Redcoats: A Study in British Revolutionary Policy* (Chapel Hill: University of North Carolina Press, 1964); Wallace Brown, *The King's Friend's: The Composition and Motives of the American Loyalists Claimants* (Providence: Brown University Press, 1965 and *The Good Americans: The Loyalists in the American Revolution* (New York: Morrow Books, 1969).

And although Brenden McConville's recent contention that colonial America was fiercely loyal to the British monarchy throughout the eighteenth century may place a greater burden on his sources than they can actually bear, his implication that the socio-political forerunners to loyalism were deeply imbedded in colonial society decades before the Revolution is worth considering and can be of great benefit to future Loyalist studies.<sup>9</sup>

Loyalist scholars have also debated and examined in some detail the ideologies that guided their loyalism. Although over the past sixty years historians have the eighteenth and nineteenth-century notions that Loyalists were adherents to absolutism, they also disagree somewhat over the contours of Loyalist political thought. William Allen Benton shows that a number of Loyalists actually accepted a number of the same political theories as their Patriot counterparts, thus labeling the nine men of his study Whig-Loyalists.<sup>10</sup> This Whig-Loyalism does not mean that their political ideology mirrored that of the Patriots, as Janice Potter has maintained.<sup>11</sup> Rather, Benton's analysis of Whig-Loyalists, because of its limited examination of only nine people, must be tempered by Robert Calhoon's rather persuasive argument that Loyalists really had no over-arching ideology to guide them. If anything, Calhoon shows that although Loyalist thought never became "a common, vital persuasion," it was a deeply complex and nuanced set of ideas, which included those constitutional and historical rules that maintained the empire, others that advanced a new imperial schema, and another that viewed the American resistance as "morally wrong and aesthetically abhorrent. While

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<sup>9</sup> Brenden McConville, *The King's Three Faces: The Rise and Fall of Royal America, 1688-1776* (Chapel Hill: University of North Carolina Press, 2006). Ironically, McConville never mentions Loyalists.

<sup>10</sup> William Allen Benton, *Whig-Loyalism: An Aspect of Political Ideology in Revolutionary America* (Rutherford, N.J. Fairleigh Dickinson University Press, 1969).

<sup>11</sup> Janice Potter, *The Liberty We Seek: Loyalist Ideology in Colonial New York and Massachusetts* (Cambridge: Harvard University Press, 1983).

some Loyalists clearly shared the same republican ideology as the Patriots, Calhoun's assertions more than demonstrate that there was much more to their ideas.<sup>12</sup>

Ideological historians of the Revolution, such as Bernard Bailyn, Gordon Wood, and J.G.A. Pocock, assert that republican ideology, with its emphasis on virtue and the dichotomy of power versus liberty, shaped the development of the American Revolution.<sup>13</sup> This "republican school" has, I believe, been more right than wrong in understanding the Revolutionary period and has explained more about how and why a revolution occurred than any other broad group of historians especially those who claim a socio-economic basis for the Revolution.<sup>14</sup> Yet, in discussing the post-war period, I offer one serious revision to this republican interpretation. First, to understand how Americans accepted the post-war reentry the Loyalists, I incorporate and embrace the "liberal" or "Lockean" critique of the republican school, namely that Revolutionary Americans were deeply concerned with individual rights.<sup>15</sup> Although these two

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<sup>12</sup> Calhoun, *Loyalists in Revolutionary America*, 505, and x.

<sup>13</sup> Bernard Bailyn, *Ideological Origins of the American Revolution* (Cambridge: Harvard University Press, 1967); Gordon Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill: University of North Carolina Press, 1970); and J. G. A. Pocock, *Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton: Princeton University Press, 1975).

<sup>14</sup> The classic statement of this interpretation is J. Franklin Jameson, *The American Revolution Considered as a Social Movement* (Princeton: Princeton University Press, 1926). For more recent works, see Woody Holton, *Forced Founders: Indians, Debtors, Slaves and the Making of the American Revolution in Virginia* (Chapel Hill: University of North Carolina Press, 1999); Gary Nash, *The Unknown Revolution: The Unruly Birth of Democracy and the Struggle to Create America* (New York: Viking, 2005); and Michael McDonnell, *The Politics of War: Race, Class, and Conflict in Revolutionary Virginia* (Chapel Hill: University of North Carolina Press, 2007). Tellingly, the Loyalists play little to no role in these recent works.

<sup>15</sup> The primary works of this "Lockean" approach is Joyce Appleby, *Capitalism and a New Social Order: The Republican Vision of the 1790s* (New York: New York University Press, 1984), and, *Liberalism and Republicanism in the Historical Imagination* (Cambridge: Harvard University Press, 1992); Isaac Kramnick, *Bolingbroke and His Circle: The Politics of Nostalgia in the Age of Walpole* (Cambridge: Harvard University Press, 1968); Kramnick, "Republican Revisionism Revisited", *American Historical Review* 87 (June 1982): 629-664; John Patrick Diggins, *The Lost Soul of American Politics: Virtue, Self-Interest, and the Foundations of Liberalism* (New York: HarperCollins, 1984); and James T. Kloppenberg, "The Virtues of Liberalism: Christianity, Republicanism, and Ethics in Early American Political Discourse," *Journal of American History* 74 (June 1987): 9-33.

interpretations have been seemingly at odds, they provoked an intense and extremely fruitful debate in the 1970s and 1980s. To bridge the gap of these two interpretations, I rely heavily on Lance Banning's argument that republicanism and liberalism blended together, focusing on the early debates on reintegration rather than on the establishment of the federal constitution as Banning asserts.<sup>16</sup>

The legal characteristics of the American Revolution remain woefully understudied. While the topic was once of some interest to historians, Jack P. Greene and John Phillip Reid, in the past several decades only two historians have devoted book-length works to the topic. Greene's account of the constitutional origins of the American Revolution concentrates on the imperial dimensions, arguing for center-periphery understanding of the conflict. It does not address fully the legal issues surrounding the Revolution.<sup>17</sup> Reid's multi-volume *Constitutional History of the American Revolution* is the only work to date that tackles the legal issue. Reid demonstrated that colonial Americans adhered to the notion that the British constitution was customary in nature while England had embraced the idea that Parliament was supreme and through control of the law served in essence as the constitution. He asserts that by the nineteenth century the nature of the law in America (and Britain) had shifted to the more modern definition of the law being the command of the sovereign and no longer confining the authority of government.<sup>18</sup> I accept Reid's overall argument with one caveat: the law as the

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<sup>16</sup> Lance Banning, "Jeffersonian Ideology Revisited: Liberal and Classical Ideas in the New American Republic," *William and Mary Quarterly* 43 (Jan. 1986): 3-19 and "Some Second Thoughts on Virtue and the Course of Revolutionary Thinking," in Terrance Ball and J.G.A. Pocock, eds. *Conceptual Change and the Constitution* (Lawrence: University Press of Kansas, 1988), 194-212.

<sup>17</sup> Jack P. Greene, *Peripheries and Center: Constitutional Development in the Extended Politics of the British Empire and the United States, 1607-1788* (Athens: University of Georgia Press, 1986).

<sup>18</sup> John Phillip Reid, *Constitutional History of the American Revolution*, 4 vols. (Madison: University of Wisconsin Press, 1986-1993).



command of the sovereign actually begins during the Revolution with the passage of anti-Loyalist legislation and the development of popular sovereignty. This jurisprudential change had important ramifications for reintegration.

My work has also benefited from the recent awareness of federalism in the Revolutionary period. The importance of federalism in the creation of the Confederation has gone unappreciated for a long time, although David Hendrickson's *Peace Pact* has helped spark interest in the topic. While Hendrickson concentrates more on how federalism influenced the development of the federal constitution of 1787, his articulation of the importance of federalism shaped my own understanding of the period, especially in the discussion of the Treaty of Paris.<sup>19</sup>

The work of social historians has also proved beneficial in trying to understand reintegration. Studies on the family and women of the Revolutionary era have yielded great insight into the personal, emotional, and social thoughts and practices of the period. The findings of these scholars have revealed important emotional and family ties that Loyalist maintained during the war and afterwards.<sup>20</sup> Oddly enough, however, social historians have rarely concentrated on Loyalists. Although many of the findings of these historians have been incorporated into my argument, I do believe that during the Revolution the hardships Loyalist families faced may have had led to even more contact with their extended families than historians have noticed. The only real area where social

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<sup>19</sup> David Hendrickson, *Peace Pact: The Lost World of the American Founding* (Lawrence: University Press of Kansas, 2003).

<sup>20</sup> Philip Greven, *Four Generations: Population, Land, and Family in Colonial Andover, Massachusetts* (Ithaca: Cornell University Press, 1970); Jim Potter, "Demographic Development and Family Structure" in Jack P. Greene and J. R. Pole, eds, *Colonial British America: Essays in the New History of the Early Modern Era* (Baltimore: The Johns Hopkins University Press, 1984), 123-156; David Hackett Fishcer, *Albion's Seed: Four British Folkways in America* (New York: Oxford University Press, 1989), 68-75, 274-280; Daniel Blake Smith, *Inside the Great House: Planter Family Life in the Eighteenth-Century Chesapeake Society* (Ithaca: Cornell University Press, 1980) and "The Study of the Family in Early America: Trends, Problems, and Prospects," *William and Mary Quarterly* 39 (Jan. 1982): 3-28.

historians have examined Loyalists in any great detail has been Loyalist women. Even then, and with the notable exception of an article by Mary Beth Norton, most of the discussions of Loyalist women have been in contrast to Patriot women.<sup>21</sup>

The paucity of information on Loyalist families is matched only by the lack of historical examination on the nature of republican citizenship and treason during the revolutionary era. James H. Kettner's work on citizenship argued that during the Revolution the idea of "volitional allegiance" – the idea that a person could voluntarily choose one's allegiance – developed into an integral aspect of the dilemma Loyalists faced.<sup>22</sup> There is much about Kettner's argument that is appealing but he does not fully develop the argument into the post-war return of Loyalists. Thus, I add to Kettner's discussion by moving his assertions forward into the immediate post-war years and analyze the ramifications of volitional allegiance on reintegration. I also attempt to build upon his work by examining what republican citizenship actually meant in Revolutionary America. Historians have all but ignored this aspect of American citizenship, but I demonstrate that it held a host of assumptions that Loyalists clearly understood when giving their allegiance to an independent America.

There have been only two serious works published on the Revolutionary development of treason, one by Williard Hurst in the 1940s and the second nearly twenty

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<sup>21</sup> Mary Beth Norton, "Eighteenth-Century American Women in Peace and War: The Case of the Loyalists" *William and Mary Quarterly* 33 (July 1976): 386-409, quote on 398 and *Liberty's Daughters: The Revolutionary Experience of American Women, 1750-1800* (Boston: Little, Brown, and Company, 1980), 140-157, 170-220; Adele Hast, *Loyalism in Revolutionary Virginia: The Norfolk Area and Eastern Shore* (Ann Arbor: UMI Research Press, 1982), 183; Linda Kerber, *Women of the Republic: Intellect and Ideology in Revolutionary America* (Chapel Hill: University of North Carolina Press, 1980), 123-134; Janice Potter-MacKinnon, *While the Women only Wept: Loyalist Refugee Women in Eastern Ontario* (Montreal: McGill-Queens University Press, 1993); and Elizabeth Evans, *Weathering the Storm: Women of the American Revolution* (New York: Charles Scribner's Sons, 1975).

<sup>22</sup> James H. Kettner, *The Development of American Citizenship, 1608-1877* (Chapel Hill: University of North Carolina Press, 1977), 173-209..

years later by Bradley Chapin. While both discuss the Revolutionary development of treason in its definition and use by courts, they do so only in order to help understand how the definition made its way into Article III of the Constitution. With an eye towards the Constitution, both scholars use the Revolution only as a stepping stone – albeit a critical one – towards a larger end.<sup>23</sup> With the obvious theme of Loyalists being considered traitors to America, this dissertation examines the development of treason during the Revolution. Like Hurst and Chapin, I examine statutes passed, but I add a new dimension by examining the development of a popular definition of treason and how it affected the persecution of Loyalists. My discussion of treason also explores the importance of citizenship and how it too factored into the wartime persecution of Loyalists and became an important element in the process of reintegration.

From my examination of the primary and secondary sources, I am convinced that the reintegration of the Loyalists was major event in post-war America that touched upon critical social, constitutional, ideological, and legal issues of the Revolutionary era. This is not to say that without one of these elements reintegration would not have occurred; history is not deterministic. Rather, these particular steps provided distinctive elements to the process that made it unfold in the unique way that it did. This process, moreover, was mainly the result of the American response to returning Loyalists, although returnees were generally active in the process as well. Because I am describing each step in that process, this dissertation is best viewed as a series of interconnected topical essays rather than an extended narrative.

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<sup>23</sup> Willard Hurst, “Treason in the United States” *Harvard Law Review* 58 (1944-1945); Bradley Chapin, *The American Law of Treason: Revolutionary and Early National Origins* (Seattle: University of Washington Press, 1963).

My analysis of Loyalism is laid out in six chapters to explain this process of reintegration. Chapter 1 examines the social and emotional dimensions of reintegration. It is the most Loyalist-centric chapter of whole work and concentrates specifically on the importance of families, women, and friendship with Patriots and other Loyalists in the decision to return. The emotional connections Loyalists shared with their families and friends provided the impetus for many of them to return as well as the assistance many of them needed to re-settle peacefully.

Chapters 2 and 3 focus on the negotiation of the Treaty of Paris and the American debate surrounding that document. The Treaty of Paris, I argue, established the foundations for reintegration through Articles Four, Five, and Six of the document. To demonstrate this foundation, both chapters explore the nexus of federalism and the Treaty that these two chapters discuss. Chapter 2 examines the imperial and Revolutionary origins of federalism and how the idea found its way into the Articles of Confederation. The chapter also looks at how federalism played a central role in negotiating the Treaty of Paris which formally ended the Revolutionary war. Chapter 3 examines the debate surrounding the Loyalist articles of the Treaty. I show how federalism played the central role in those debates with some arguing that the states had the sole authority to enforce the provisions (and, in essence, reintegration) while another group contended that the Confederation Congress had the authority to implement the Treaty. In the end, those asserting the states' authority won their argument and thus reintegration became the province of the individual states.

Chapters 4 through 6 describe the actual process of reintegration. Chapter 4 looks at the ideological debate over allowing Loyalist reentry. It traces the shift from

republican ideology, during which the war made Patriots consider the Loyalists bereft of virtue, to a gradual acceptance that returning Loyalists possessed the same rights as Patriots. Chapter 5 discusses the war time enactment and post-war repeal of the anti-Loyalist laws. I contend that a jurisprudential transformation coupled with the development of popular sovereignty allowed for the enactment of those laws during the war. Once some Americans accepted the idea that Loyalists enjoyed the same civil rights as themselves, these laws had to be repealed despite serious opposition. The final chapter probes how Loyalists were persecuted as traitors during the Revolutionary War yet became citizens of their states after the war. In order to explain this transformation, I explore the legal and popular understandings of treason and the difference between being a republican citizen rather than a subject of the British monarch. Only through the Tory acceptance of this difference could a Loyalist go from being a Loyalist in war to an American in peace.

Finally, a note is needed on my terminology of Loyalists. I do not make a distinction between the variances of resistance to the Patriot cause. Although some colonial Americans were especially critical of the colonial response to the imperial crisis and others did not vocally join the British until the military conflict and others still, like Quakers, sided with neither because of beliefs, it ultimately does not matter to this story. Patriots considered both to be Loyalists during the war and afterwards when some attempted to return. I also label as Loyalists those colonials who were disaffected. While a great deal of scholarship has attempted to explain the disaffected, when they decided to reintegrate Patriots lumped them into the same category as the Loyalists. Also, I often describe those Loyalists wishing to become citizens as “returning Loyalists.” This is

done, too, for simplicity as a large number of Loyalist did not flee into exile; they remained either near their home or in one of the thirteen states. In order to keep from exhaustive use of the word Loyalist, I also use the terms, “Tory” or “King’s friends.” Although the word Tory carried a rather nasty connotation during the Revolution, it is done here only as another name for opponents of American independence, while “King’s friends” was often used in the early days of the Revolutionary war. Finally, in order to distinguish between groups I capitalize the words Loyalist and Patriot.

## Chapter 2

### In the Midst of Civil War:

#### Family, Friends and the Emotional Aspects of Reintegration

In the search to find the causes and repercussions of the American Revolution, historians often overlook the fact that it was also a civil war.<sup>1</sup> When the civil war aspect has been discussed, it is often in the context of the now-clichéd idea that the Revolution was not just a question of home rule, but also of who would rule at home.<sup>2</sup> The various attempts in trying to answer this question usually examine only the Patriot side of the dispute by claiming that a Patriot aristocracy quickly retreated from and opposed a radically democratic population bent on truly turning the world upside down.<sup>3</sup> Yet, because of all the attention devoted to this Patriot debate, historians too often lose sight of the Loyalists role in the Revolution. Bringing the Loyalists into the story of the

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<sup>1</sup> A great exception to this is John Shy, *A People Numerous and Armed: Reflections on the Military Struggle for American Independence*, rev. ed. (Ann Arbor: The University of Michigan Press, 1990), 117-132, 163-180 and "The Loyalist Problem in the Lower Hudson Valley: The British Perspective" in Robert A. East and Jacob Judd, eds., *The Loyalists Americans: A Focus on Greater New York*: Tarrytown, NY: Sleepy Hollow Restorations, 1975), 3-14.

<sup>2</sup> This statement was first made by Carl Becker, *The History of Political Parties in the Province of New York, 1760-1776* (Madison: University of Wisconsin Press, 1909).

<sup>3</sup> This is one of the main themes of "Progressive" and "Neo-Progressive" historians. Recent works on this topic include Woody Holton, *Forced Founders: Indians, Debtors, Slaves and the Making of the American Revolution in Virginia* (Chapel Hill: University of North Carolina Press, 1999); Gary Nash, *The Unknown Revolution: The Unruly Birth of Democracy and the Struggle to Create America* (New York: Viking, 2005); Michael McDonnell, *The Politics of War: Race, Class, and Conflict in Revolutionary Virginia* (Chapel Hill: University of North Carolina Press, 2007). Also, see J. Franklin Jameson, *The American Revolution Considered as a Social Movement* (Princeton: Princeton University Press, 1926); Merrill Jensen, *The Articles of Confederation: An Interpretation of the Social-Constitutional History of the American Revolution, 1774-1781* (Madison: University of Wisconsin Press, 1940) and *The New Nation: A History of the United States during the Confederation, 1781-1789* (New York: Vintage, 1950); Edward Countryman, *A People in Revolution: The American Revolution and Political Society in New York, 1760-1790* (New York: Norton, 1981); and the collections of essays in Alfred Young, ed., *The American Revolution: Explorations in the History of American Radicalism* (DeKalb: Northern Illinois University Press, 1976). Despite the outpouring of work, advocates of this interpretation still have not proven that such a dichotomy existed to the degree they claim.

American Revolution demonstrates that the real civil war dimension of the Revolution was between Loyalist and Patriots.

This chapter examines the Revolution as a civil war and discusses some of the brutal treatment Patriots visited upon Loyalists during the War. One of the most significant results of this treatment illuminates important social aspects about the lives of Loyalists. We can see how they relied upon the emotional bonds to their family and friends and used these connections to help cope with the traumas they faced. It is the overall argument of this chapter that the bonds of kith and kin provided important motivations and served as an aegis for those Loyalists who chose to become Americans after the war. To explain the importance of these bonds, this chapter explores the importance of family in eighteenth-century America, the special role Loyalist women played during and after the War, the emotional importance of friendship, and the function to reintegration that friendships performed.

### **Patriot Treatment of Loyalist during the War**

Civil wars are particularly nasty affairs, filled with extreme violence, as the English Civil War of the mid-seventeenth century and the French Revolution of the late-eighteenth century demonstrate. The American Revolution, however, was unique in some important ways. Throughout the Revolution, Patriots made considerable effort to follow the rule of law and ensure due process to enemies, while American military officers also followed the norms of eighteenth-century warfare.<sup>4</sup> These actions resulted

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<sup>4</sup> Chapters 5 and 6 of this work examine due process for Loyalists. For American officers following the norms of conduct of eighteenth-century warfare see Judith Van Buskirk, *Generous Enemies: Patriots and Loyalists in Revolutionary New York* (Philadelphia: Penn University Press, 2003), 73-106.



in Revolution noted more for its order and calm and has led generations of historians to question whether the American Revolution was radical.<sup>5</sup>

Yet, one must be careful not to overestimate the degree of law and order.

Although there is much truth to the interpretation, it often overlooks what Loyalist scholars and students of early American violence have convincingly shown: that the Revolution was also a civil war where intense violence was inflicted upon dissenters by people who were neighbors and former friends. This violence was not a one-sided affair, as both Patriots and Loyalists engaged in serious and often brutal attacks against one another particular in the South.<sup>6</sup> Some of these encounters were military in nature, as Patriot and Loyalist soldiers fought on the battlefield as they did in the Battle of King's Mountain. While military actions can show civil war aspect of the Revolution in rather stark terms – the Patriot forces after the Battle of King's Mountain in 1780 engaged vicious revenge attacks against local Loyalists – military encounters between Loyalist and Patriot forces were significantly fewer than the near daily encounters between civilians Tories and Whigs.<sup>7</sup> These non-military actions against Loyalists fell into

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<sup>5</sup> The idea that the American Revolution was a conservative Revolution more about the defense of English liberties and political ideology can be found in John Phillip Reid, *Constitutional History of the American Revolution*, 4 vols. (Madison: University of Wisconsin Press, 1986-1993); Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge: Harvard University Press, 1967); and R. R. Palmer, *The Age of the Democratic Revolution* 2 vols. (Princeton: University of Princeton Press, 1959), 1: 185-190. For the radicalism argument, see Jameson, *American Revolution Considered as a Social Movement*; Young, ed., *The American Revolution: Explorations in the History of American Radicalism*; and Gordon Wood, *Radicalism of the American Revolution* (New York: Knopf, 1991), which tries to bridge the ideological and progressive schools.

<sup>6</sup> Good examples of this are Wallace Brown, *The Good Americans: The Loyalists in the American Revolution* (New York: William Marrow and Company, 1969), 126-144; Richard Maxwell Brown, "Violence and the American Revolution" in Stephen G. Kurtz and James H. Hutson, eds., *Essays on the American Revolution* (New York: Norton, 1973), 81-120; Allan Kulikoff, "Revolutionary Violence and the Origins of American Democracy," *Journal of the Historical Society* 2 (2002): 229-260; and Wayne E. Lee, *Crowds and Soldiers in Revolutionary North Carolina: The Culture of Violence in Riot and War* (Gainesville: University of Florida Press, 2001).

<sup>7</sup> For the Patriot-Loyalist conflict in this battle see Robert S. Lambert, *South Carolina Loyalists in the American Revolution* (Columbia: University of South Carolina Press, 1987), 200-206.

several categories: physical, legal, financial, and political. While others chapters of this work discuss some of these features, particularly the later three, this section will focus on the physical abuse Patriots perpetrated against Loyalists during the War.

During the War, an anonymous author, writing under the pseudonym, “Papinian,” catalogued the numerous types of physical abuse Loyalists endured at the hands of Patriots. Papinian warned that for their loyalty, any Loyalist could face tarring and feathering, rail riding, being driven “like cattle” to distant colonies, flung “into laothesome [*sic*] jails, confiscating their estates, shooting them in swamps and woods as suspected Tories, hanging them after a mock trial; and all this because they would not abjure their rightful Sovereign, and bear arms against him.”<sup>8</sup> There was not a great deal of exaggeration in Papinian’s list, as some Tories faced one of these threats at some point during the Revolutionary Era.

The most famous form of physical abuse Loyalists endured was tarring and feathering. Although the punishment has lingered more in the popular mind than its actual use in the Revolutionary period, Loyalists nonetheless feared it.<sup>9</sup> A contemporary noted process of how a member of the King’s friends should receive this punishment.

The following is the Receipe for an effectual Operation. “First strip a Person naked, then heat the Tar until it is thin, and pour it upon the naked Flesh, or rub it over with a Tar Brush *quantum sufficit*. After which, sprinkle decently upon the Tar, whilst it is yet warm, as many Feathers a will stick to it. Then hold a lighted Candle to the Feathers, and try to set it all on Fire; if it will burn so much the better. But as the Experiment is often made in cold Weather; it will not then succeed – take also an Halter and put it round the Person’s Neck, and then cart him the rounds.”<sup>10</sup>

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<sup>8</sup> “Papinian,” *Rivington’s Gazette*, May 29, 1779.

<sup>9</sup> Benjamin Irving, “Tar, Feathers, and the Enemies of American Liberties, 1768-1776,” *New England Quarterly* 76 (2003): 197-238.

<sup>10</sup> Douglas Adair and John A. Schutz, eds., *Peter’s Oliver’s Origin and Progress of the American Rebellion* (Stanford: Stanford University Press, 1961), 94.

Numerous instances abound throughout the Revolution where a group of Patriots tarred and feathered a suspected Loyalist or, at least, threatened to. In Virginia, William Aitchison described to his Loyalist friend, James Parker, how several suspected Loyalists were threatened with tar and feathers because they refused to sign the Continental Association. "Their lives were threatened but tar and feathers was thought to be the Slightest punishment they could get off [with]."<sup>11</sup> In New York, Patriot groups tarred a cobbler because he spoke "many disrespectful and abusive Words, of the American Congressess, Committees, and Proceedings."<sup>12</sup> In New York City, from June 9-12, 1776, Patriots seized a number of Loyalists and stripped their clothes and tarred and feathered them and burned their faces with candles. It took American military commanders several days to gain control of the situation.<sup>13</sup>

Although cooler heads eventually prevailed in New York and Aitchison's friends were not abused, the same cannot be said for Stephen Resco, a suspected Loyalist from Stockbridge, Massachusetts. In the spring of 1775 British troops captured Resco but after deeming him harmless released him to his home. Soon thereafter, Continental troops captured the ill-lucked Resco and kept him prisoner "for no other Crime but because he had once been Prisoner to the King's Troops." After a long confinement, the Patriot troops paroled him after finding that he was "an honest, inoffensive man." Soon after his return home from his second imprisonment, a group of Resco's neighbors demanded an explanation for why he was captured by Patriot troops. Not hearing to their satisfaction a

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<sup>11</sup> Quoted in Catherine Crary, *The Prince of Loyalty: Tory Writings from the Revolutionary Era* (New York: McGraw Hill, 1973), 58-59.

<sup>12</sup> Phillip Ranlet, *The New York Loyalists* (Knoxville: University of Tennessee Press, 1986), 154.

<sup>13</sup> *Ibid.*

recantation of his supposed Loyalism (his actual Loyalism remains unknown) Resco's neighbors – including a Deacon of local church – “proceeded to besmear him with Soot and Tar, which they overlaid with Feathers” and then “crown[ed] him with an Owl which had been killed for that purpose and in that Plight they [drove] him before them to” the local committee. Although the committee condemned the actions of the mob, it recommended that for Resco's safety, he be imprisoned in the local jail, a suggestion which he readily accepted.<sup>14</sup>

As humiliating and painful – as well as potentially deadly – tarring and feathering could be, Patriots relied upon other punishments for Loyalists such as riding a rail. While this particular punishment had its origins in Europe, it was a particular favorite of Patriots and, in some cases, followed a tarring and feathering, although it was also administered independently. Often called “grand Toory Rides,” the procedure included forcing a narrow rail between the (always male) Loyalist's legs as he stood upright. They then picked up the rail and carried him along, all the while bouncing the rail and forcing the Loyalists to jump along it, causing obvious and great pain. Such was the fate of Dr. Joseph Clarke of Reeding, Massachusetts. While in Hartford, Connecticut, a group of Patriots seized Clarke because of his “firm Attachment to the King and Constitution” and forced him to ride a rail. Due to the pain of the experience, “he several times fainted,” and when the Patriots finished with him his injuries were in such a “Manner as unfit for description in a News-Paper.”<sup>15</sup> Peter Elting commented on how, in New York City, a number of Loyalists were forced to ride rails. As he wrote Richard Varick, “We had some Grand Toory Rides in this City . . . Several of them were handeled verry Roughly

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<sup>14</sup> Crary, *The Prince of Loyalty*, 59.

<sup>15</sup> *New York Gazette and Weekly Mercury*, February 27, 1775.

Being Carried through the streets on Rails, there Cloaths Tore from there [*sic*] backs and there Bodies pretty well mingled with the dust.”<sup>16</sup>

While tarring and feathering and rail riding were the most infamous punishments Loyalists faced, they were not the only ones. Local committees or, sometimes groups acting on their own, were very clever, if not comical, at finding ways to punish and humiliate neighbors they suspected of Loyalism. The Augusta, Georgia committee ordered William Davies to be drummed around a liberty tree three times and notification in the newspaper that he was a “person inimical to the rights and liberties of America.” The Boston Committee of Correspondence made Daniel Leonard, a prominent Loyalist, sit on a batch of ice to temper his heated Loyalism.<sup>17</sup>

In other cases, the punishments made up in brutality what they lacked in creativity. No region experienced this sort of civil war violence more than the South, and no place in the South had more Loyalist and Patriot conflict than South Carolina. From the initial days of the War, Loyalist and Patriots residents of the state traded blows as Loyalists ransacked Patriot homes and threatened Patriot supporters while Patriot mobs returned the favor. American General Nathanael Greene reported on the situation in late 1780, noting that “The Whigs and Tories pursue one another with the most relentless fury, killing and destroying each other wherever they meet.”<sup>18</sup> Yet, after the Battle of King’s Mountain in 1780 and the control of the backcountry firmly in Patriot hands, the American forces engaged in an extended campaign of revenge. Patriot militia forces shot dead a man at his house simply because they believed he was harboring a

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<sup>16</sup> Quote from Crary, *The Prince of Loyalty*, 58.

<sup>17</sup> *Ibid.*

<sup>18</sup> Nathanael Greene, to General Robert Howe, December 21, 1780 in “Revolutionary Letters,” *South Carolina Historical and Genealogical Magazine* 38 (1937): 16.

Loyalist.<sup>19</sup> An officer of the Loyalist militia, Samuel Bradley, was captured by a group of Patriots and executed almost immediately. His executioners considered Bradley's death revenge for his brother's capturing of American soldiers.<sup>20</sup> In another instance, an American militiaman bragged how "around [Adam] Steedham's neck I fastened the rope, as a reward for his cruelties," which were providing British troops with information on militia movements that lead to their ambush.<sup>21</sup>

### **The Importance of Family in Eighteenth Century America**

Understandably, Loyalists often lived in great fear of suffering some sort of castigation at their neighbor's hands. This fear only intensified as the war dragged on, and Patriot governments became more established and increasing legislation passed to punish Loyalism. One of the most important ways Loyalists coped with what must have been great mental anguish was their reliance on their families as a source of information and comfort.

Social historians have demonstrated the growing emotional importance of families in eighteenth-century America. While studies of colonial and early national families expose some regional variances in their operations and beliefs, some commonalities existed.<sup>22</sup> From New England to the Middle colonies and the South, the family became more intimate and private. During the seventeenth century, the extended

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<sup>19</sup> Lambert, *South Carolina Loyalists*, 202.

<sup>20</sup> *Ibid.*, 202.

<sup>21</sup> *Ibid.*, 201.

<sup>22</sup> Philip Greven, *Four Generations: Population, Land, and Family in Colonial Andover, Massachusetts* (Ithaca: Cornell University Press, 1970); Jim Potter, "Demographic Development and Family Structure" in Jack P. Greene and J. R. Pole, eds, *Colonial British America: Essays in the New History of the Early Modern Era* (Baltimore: The Johns Hopkins University Press, 1984), 123-156; David Hackett Fischer, *Albion's Seed: Four British Folkways in America* (New York: Oxford University Press, 1989), 68-75, 274-280; Daniel Blake Smith, *Inside the Great House: Planter Family Life in the Eighteenth-Century Chesapeake Society* (Ithaca: Cornell University Press, 1980) and "The Study of the Family in Early America: Trends, Problems, and Prospects," *William and Mary Quarterly* 39 (Jan. 1982): 3-28.

family played a larger role in everyday life as aunts, uncles, and cousins formed a major part of a family member's education and connections to the outside world. In the Chesapeake region, for example, uncles rather than fathers often assumed the responsibility for educating their nephews and in-laws frequently took in their sons-in-law in times of financial difficulty. Not only this, but children were often viewed more as potential workers rather than a source of joy. Families before the eighteenth century, therefore, were greatly interdependent.<sup>23</sup>

From the late colonial to the early national period, however, family structure began to change. As historian Daniel Blake Smith has written, "a 'segmental' rather than an 'interdependent' family organization typified most American families in the late eighteenth century."<sup>24</sup> Diminished were the extensive connections to extended family members; supplanting them was a more private and smaller unit concentrated on the nuclear family of father, mother, and offspring. Part of this transformation derived from the attempt of younger men pursuing their own economic self-sufficiency; family ties were not as strong as in the past since men became (or attempted to become) more independent.

A second and perhaps more important reason for this change stemmed from an emotional shift in child rearing. No longer did families – fathers in particular – regard their offspring in stark economic terms. Rather, children became the center of family life and a source of pride and enjoyment for parents. In essence, a growing affection and sentimentality converted the once open and extended, but ultimately less emotional,

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<sup>23</sup> Smith, *Inside the Great House*, 25-54.

<sup>24</sup> *Ibid.*, 289.

family into the more private, close-knit group with which modern Americans are more familiar.

This structural alteration of the eighteenth-century family served an important function for the politically active head of the household. His family became the refuge, if only temporarily, from the hassles of the outside world. The messy and very personal world of mid- to late-eighteenth century politics only reinforced the importance of this domestic retreat. Looking at the experiences of the leading Patriots demonstrates the significance these leaders placed upon their private families to be a source of succor. It is well known that George Washington desired nothing more than to return to Mount Vernon. Washington's fellow Virginian, Thomas Jefferson, had a near obsession with escaping to his home, Monticello. Throughout his entire career, John Adams wrote frequently to his wife, Abigail, expressing his desire to return to their Massachusetts home and escape the political strife which seemed to follow him everywhere he went.<sup>25</sup>

### **Emotional Importance of Family to Loyalists during the Revolutionary Era**

The Loyalist family fits the pattern family historians have detected in the eighteenth century. During the Revolutionary period, however, they become distinct in one particular way. Whereas most families were becoming more private and more nuclear in structure, Loyalist families during the Revolution seem to have had an exaggerated emotional connection to the family, leading them to extend their network of kin to a degree that was not present before the War. In extant Loyalist writings, a large

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<sup>25</sup> For examples, see George Washington to George William Fairfax, July 10, 1783, in Thomas J. Fleming, ed., *'Affectionately Yours, George Washington: A Self-Portrait in Letters of Friendship'* (New York: Norton, 1967), 185; Thomas Jefferson to James Monroe, May 20, 1782, in Merrill D. Peterson, ed., *The Portable Thomas Jefferson* (New York: Penguin, 1975), 363-366; and John Adams to Abigail Adams, July 20 and August 4, 1776, in Herbert Butterfield, et al., eds., *The Book of Abigail and John: Selected Letters of the Adams Family, 1762-1784* (Cambridge: Harvard University Press, 1975), 147, 149-150.



number were addressed to siblings or aunts and uncles. Not only did Loyalists correspond frequently with their siblings, but they often concerned themselves with the welfare of their more remote family members. Elias Ball of South Carolina, who fled to East Florida during the War and London afterwards, maintained a correspondence with his cousin throughout the Revolutionary period in which he inquired regularly about the state of the family's property and the health of his relatives in South Carolina. Gregory Townsend, while exiled, carried on a rather extensive correspondence with his uncle and niece; he informed his niece that he often awaited her letters because he "anxiously wishes your welfare and for very frequent opportunities of hearing from you."<sup>26</sup> Such correspondence between family members maintained, as best as could be possible under the circumstances, the emotional bonds that kept a family together. To be sure, Patriot families expressed much of the same concern for siblings and other family members. Yet during the Revolutionary crisis, the Loyalists had tremendous concern for the welfare of his extended family. To a great degree, the Revolution itself can explain the larger kin perspective of Loyalists. Since they faced, in some cases, serious and potentially deadly persecution from the Patriots it is not surprising that a larger number of Tory correspondences was between siblings who sought information on their each others or other family members' well-being.

The shelter families provided from the political storms of the Revolution applied to the Loyalists too, perhaps even more than Patriots, given persecution Tories faced for their Loyalism. "To be settled in a family way," explained one Tory woman, "would be

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<sup>26</sup> Ball Family Papers, South Carolinaia Library, microfiche copy at the University of Kentucky; Gregory Townsend to His Niece, October 4, 1782, Gregory Townsend Papers, Massachusetts Historical Society; William Duane, ed., *Extracts from the Diary of Christopher Marshall during the American Revolution, 1774-1781* (Albany: Joel Munsell, 1877), 141; James Murray to Dorothy Forbes and Elizabeth Murray, June 19, 1777 in Nina Moore Tiffany, ed., *Letters of James Murray*, 262-265.

better than this,” by which she meant dealing with the problems the Revolution brought.<sup>27</sup> Yet, with one recent exception, historians of both the Loyalists and the eighteenth-century family have essentially ignored each other and the sentiments expressed in the letter just cited. In most cases, this indifference has been to the historian’s detriment.<sup>28</sup>

Even among families that were divided because of their political choices during the war, there were attempts by Patriot members to lend assistance to their Loyalist relatives in returning to America. Historian Judith Van Buskirk has recently shown how in New York City, families consisting of Patriots and Loyalists, as well as those who divided on the question of American independence, continued to maintain their “web of family,” even crossing enemy-controlled territory to visit them. These familial connections continued after the War as well.<sup>29</sup> One of greatest examples of a Patriot member of a family helping his Loyalist kin can be found in the letters of North Carolina Patriot and State legislator, Alexander McClaine, who wrote to his son-in-law, Loyalist George Hooper. McClaine’s correspondence provided Hooper with information on the condition of Hooper’s wife, Catherine (whom McClaine called “Kitty”), who had remained behind when Hooper fled the state. The most interesting feature of the letters was the lengths the father went to assist the son-in-law despite his Loyalism. Throughout the letters, McClaine provided constant updates on the progress of trying to obtain pardons and citizenship for Hooper, or advising him to obtain citizenship in South Carolina to help his chance of property recovering in North Carolina. In other letters,

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<sup>27</sup> Elizabeth Inman to Ralph Inman, May 20, 1775 in Tiffany, ed., *The Letters of James Murray, Loyalists*, (Boston: n.p., 1901), 201.

<sup>28</sup> The exception is Van Buskirk, *Generous Enemies*.

<sup>29</sup> The “web of family” is the title of chapter 2 of *Generous Enemies*.

McClaine lamented the state's failure to comply with the Treaty of Peace – which had adverse effects for Hooper – and the raging anti-Loyalist sentiment throughout the state and its government. Despite their opposing views of the Revolution, McClaine also made a point to relay his affection for his son-in-law. Not only was McClaine acting on his political principles that returning Loyalists deserved the same rights as Patriots, he was also following his fatherly duties by assisting his much beloved daughter's husband.<sup>30</sup>

This heightened sense of familial bonds and the need to seek out news of family members also factored into the emotional elements of family life. This is not to say, of course, that before the Revolution Loyalist families did not express their emotional connections, but rather that the Revolution and the constant threat of persecution by Patriots made these emotions more intense. A sad but notable illustration of this strong familial emotional investment and the pain of loss during the War can be found in the experience of Peter Van Schaack. In the midst of the Revolutionary crisis while he was being forced to consider joining the Patriot cause or flee to England, Van Schaack lost his oldest son, Cornelius. Two days after his burial, Van Schaack received word that his youngest son, who remained at the family estate with a nurse, had also died en route to meet his father and mother. While the death of young children was an unfortunate aspect of daily life in Revolutionary America, the grief Van Schaack suffered was great. It was so great, in fact, that he turned to his diary to vent his loss “upon the death of two of my

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<sup>30</sup> For the McClaine to Hooper letters see Walter Clark, ed., *The State Records of North Carolina*, 26 vols. (Raleigh: P.M. Hale, 1886-1907), 16 and 17; *passim*. For two other examples of this assistance but with more acrimony see Abraham Bancker to Abraham Bancker, May 22 1782, Bancker Family Papers, New York Historical Society and Cornelia Walton to William and Jacob Walton, April 8, 1782; Cornelia Walton to James Robertson, April 8, 1782; and William Walton to Cornelia Walton, April 23, 1782, in Beekman Family Papers, Box 22, folder 5, New York Historical Library. Cornelia Walton's experience with her relatives is covered in detail in Van Buskirk, *Generous Enemies*, 159-162.

children within a few days of each other.”<sup>31</sup> The New York Loyalist also relied upon his devout Christian faith to find the solace he required to cope with his loss. “There cannot be,” he wrote in an attempt to make sense of his grief, “a stronger internal evidence of the truth of Christianity, that it alone affords us relief, on those trying occasions which we are daily subjected to.”<sup>32</sup>

The Revolution did not allow Van Schaack’s suffering to subside. At the brink of his forced exile in 1778, his wife’s health turned poor. Her desire to return to New York City, her birthplace, forced Van Schaack to seek permission from the Patriot authorities to travel to the city. As he told his close Patriot friend, John Jay, he did not want to go to the city but wished to “save my mind from that regret which I should feel in case of a calamity.”<sup>33</sup> The New York Committee to Detect Conspiracies denied the Van Schaacks permission to travel to the city, and in April tragedy again struck Van Schaack: his wife died. Steeling himself, he purposefully recorded in his diary the events of the last days of his wife’s life. He did so, he admitted with great pain, to “preserve in my mind the remembrance of those solemn scenes, and also designed for the dear pledges of our affection.” His poignant remembrance was filled with emotion and intense sadness for the loss of a spouse. Their marriage was not out of convenience or economic concerns, but rather out of love. She was, he said, “my ever dear and ever to be regretted wife.”<sup>34</sup>

The emotional significance of the family for Loyalists during the Revolution can also be demonstrated in the care and concern fathers often expressed for their sons.

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<sup>31</sup> Henry Cruger Van Schaack, ed., *The Life of Peter Van Schacck, LL.D.* (New York: D. Appleton and Co., 1842), 48-51.

<sup>32</sup> *Ibid.*, 49.

<sup>33</sup> Van Schaack to John Jay, March 18, 1778, in *ibid.*, 95-96.

<sup>34</sup> *Ibid.*, 479-485.

Loyalist fathers, just like their Patriot counterparts, prided themselves on their offspring. In some cases fathers cautioned their sons to avoid the tumultuousness of the period. In 1774, at the height of imperial crisis, the Georgia planter, Lewis Johnston, who would side with the Loyalists in the War, begged his son, Billy, who was studying medicine with Benjamin Rush in Philadelphia, to not “take part in the unhappy political disputes” raging in that city. Johnston told his son that the request and advice was part of his duty as a father; he did not want to see his son’s future cast away because of political sentiments that would give “offense to one side or the other.”<sup>35</sup> When the Revolution came, Billy returned to Savannah, but not for long as the Patriot-controlled Georgia legislature banished Lewis, after which Billy became a Loyalist officer in the British military. Having earlier obtained his medical degree in Edinburgh, after the Revolution, Billy settled in Kingston, Jamaica where he practiced medicine.<sup>36</sup> Other Loyalist fathers, especially those in exile, wrote their sons still living in America reminding them to continue their studies. If the child happened to be too young, the Loyalist often wrote a spouse or a close relative, such as a brother, requesting the proper upbringing of the child.<sup>37</sup> Fathers also took great care to know the health of their offspring or to pass along knowledge of their child’s status to a spouse.<sup>38</sup>

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<sup>35</sup> Elizabeth Johnston, *Recollections of a Georgia Loyalist*, Arthur Eaton, ed., (New York: The Bankside Press, 1901), 27-28.

<sup>36</sup> *Ibid.*, 28-30.

<sup>37</sup> Van Shaack, ed., *Life of Peter Van Schaack*. Also see Gregory Townsend Papers, Massachusetts Historical Society; Louisa Suszanna Wells, *The Journal of a Voyage from Charleston, S.C. to London Undertaken during the American Revolution by a Daughter of an Eminent American Loyalists in the Year 1778 and Written from Memory in 1779* (New York: New York Historical Society, 1906), 1-4.

<sup>38</sup> *Ibid.*, 185-204.

It is from exiled Loyalists that the clearest examples of the emotional importance of the family emerge.<sup>39</sup> Often, when a male Loyalist voluntarily fled his home to escape persecution or some other potential harm or was banished to another state, his children and wife were frequently left behind. Sometimes, with Patriots close on his heels, the Tory had no time or financial means to transport them. Other times the family was left behind on purpose. By having the family stay on their property often meant that some part of the property would avoid confiscation. In fact, states often left a portion of confiscated property for the wife or family especially if the Loyalist family was destitute.

Whatever the reason for leaving family members, exiled Tories felt acutely the emotional pain of the separation. Three Massachusetts Loyalists typify the experience. Samuel Curwen, who fled to London in 1775, recorded in his dairy on New Year's Eve that he hoped the upcoming year would end the "afflictions I have suffered this year, in an unhappy banishment from my family and friends." John Chandler, who was prevented from returning to Massachusetts in 1784, wrote his daughter that he desired nothing more than to be with this family. "I long," he wrote, "for the happy days when I may see all my dear children, but whether I am to be so happy, time must determine." The death of Chandler's wife six months before he wrote his daughter surely intensified his longing to see his children.<sup>40</sup> Sarah Winslow, while preparing to leave Massachusetts for Nova Scotia, admitted that she did not want to leave. Yet part of the comfort she took from contemplating a permanent exile was to be with her brother, Edward, whom she

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<sup>39</sup> The best work on the exiled experience remains Mary Beth Norton, *The British-Americans*. Oddly enough, Norton's work, for all its discussion of the emotionalism of the exiled experience does not discuss Loyalist's families. Also, see Stephanie Kermes, "'I Wish for Nothing More Ardentlly upon Earth, than to See My Friends and Country Again:' The Return of the Massachusetts Loyalists," *Historical Journal of Massachusetts* 30 (Winter 2002): 30-49.

<sup>40</sup> Andrew McFarland Davis, *The Confiscation of John Chandler's Estate* (Boston: Houghton, Mifflin, and Company, 1903), 17.

“wish[ed] never again to be separated from.” Life in Nova Scotia – while harsh and difficult – provided at least one alluring aspect to Sarah: “to retire entirely to my own family and endeavor to remain unmolested,” she wrote.<sup>41</sup> The pain and desire these Massachusetts Loyalists felt to be with their families was intense, and these emotions were multiplied in exiled Loyalists from all across the America who had left family members behind. The anguish of being separated from their families, their source of security and joy in life, in a time of crisis such as the Revolution when one often did not know what the next day brought, quickly turned their exiled sojourn into episodes of extended homesickness and melancholy and in some cases suicide.<sup>42</sup> Given the distress of separation, not surprisingly the first piece of business for returning Loyalists was visiting their families and friends.<sup>43</sup>

### **Loyalist Women**

Loyalist women deserve special mention for their role during the Revolution and post-war years. Despite long-held notions that women were apolitical and in need of male protection due to their more “delicate” nature, recent historiography has demonstrated that women were quite active in the Revolution. Most of these studies, however, have focused heavily on Patriot women, ignoring how Tory women faced much the same fate as their more politically active husbands, fathers, and brothers. Yet accounts abound regarding the Patriot treatment of Tory women. As one historian of Loyalist women has noted, “female Loyalists were often verbally abused, imprisoned, and threatened with bodily harm even when they had not taken an active role in opposing

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<sup>41</sup> Sarah Winslow to Benjamin Marston, April 10, 1783, in W. O. Raymond, *Winslow Papers, A.D. 1776-1826* (New Brunswick: Sun Print Co., 1901), 78-80.

<sup>42</sup> Norton, *The British-Americans*, 96-130; Mass, “Return of the Massachusetts Loyalists,” 343-344.

<sup>43</sup> Kermes, “I Wish for Nothing More,” 30-49.

the rebel cause.”<sup>44</sup> But in spite of this abuse, they remained loyal and some even took active roles in support of the British.

One of the most notorious examples of Patriot treatment of a Loyalist woman was that of Mary Watts Johnson, the wife of Sir John Johnson. Johnson vowed in fall of 1775 never to support the Patriot cause and refused to sign the Continental Association, which called for an embargo of English goods. Arrested and paroled, he soon broke parole and fled to Montreal, leaving behind his wife, in large part because she was in the last trimester of her pregnancy. Johnson assumed his wife, because of her delicate situation, would remain safe from any Patriot actions. He was wrong. Despite her pregnancy, after discovering Sir John’s departure, the Albany Committee took Mary into custody and transported her under armed guard to Albany. Once in Albany, the Committee placed her under town arrest – meaning she could not leave the city under pain of death. The Committee also informed her that should “Sir John [appear] in arms against the Americans, retaliation should be made and she should be the object, and her life depended on her husband’s actions.”<sup>45</sup> In essence, she was made a hostage and an insurance policy against her husband’s military actions. The Committee eventually transferred Mary to the home of Cadwallader Colden, a former royal Governor of New York where, with the help of some of her husband’s tenants, she escaped and joined her

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<sup>44</sup> There has not been as much attention paid to Loyalist women, at least when compared to their Patriot counterparts. For works on Loyalist women, see Mary Beth Norton, “Eighteenth-Century American Women in Peace and War: The Case of the Loyalists” *William and Mary Quarterly* 33 (July 1976): 386-409, quote on 398 and *Liberty’s Daughters: The Revolutionary Experience of American Women, 1750-1800* (Boston: Little, Brown, and Company, 1980), 140-157, 170-220; Adele Hast, *Loyalism in Revolutionary Virginia: The Norfolk Area and Eastern Shore* (Ann Arbor: UMI Research Press, 1982), 183; Linda Kerber, *Women of the Republic: Intellect and Ideology in Revolutionary America* (Chapel Hill: University of North Carolina Press, 1980), 123-134; Janice Potter-MacKinnon, *While the Women only Wept: Loyalist Refugee Women in Eastern Ontario* (Montreal: McGill-Queens University Press, 1993); and Elizabeth Evans, *Weathering the Storm: Women of the American Revolution* (New York: Charles Scribner’s Sons, 1975).

<sup>45</sup> Quoted in Catherine Crary, *The Price of Loyalty: Tory Writings from the Revolutionary Era* (New York: McGraw-Hill, 1973), 78-80.



husband, but not before her two youngest children – which included her new baby – died from the harshness of the journey.<sup>46</sup> Thus, pregnant, forced to travel, and rendered a hostage, only to lose the child in a daring escape, Mary’s only real crime was being the wife of a well-known Loyalist. She had taken no active part against the Americans.

Despite the risk, a number of Loyalist women assisted the British in their military operations. They often provided medical aid to prisoners or they served as valuable source of intelligence. When these Loyalist women were captured by American forces, they often felt the reality of the threats given to their less active sisters. When American forces learned that Lorenda Holmes carried letters behind British military lines, they stormed her house and ripped off her clothes and “expos[ed] her to many Thousands of People Naked.” Months later, American troops returned and held her right foot over hot coals “until he had brunt it in a most shocking manner” because she had directed some Loyalist refugees to the British camp.<sup>47</sup>

One area where Loyalist women were of great assistance to their families was in defense of the family property. By remaining on their family’s property, they could fend off attempts at confiscation, as Thomas Brattle’s sister did against the Massachusetts General Court throughout the Revolution.<sup>48</sup> The Patriot-controlled state governments even recognized the importance of Loyalist women and property, as many of the various

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<sup>46</sup> *Ibid.*, 80. Likewise, Isabella MacDonald watched helplessly as American forces robbed and plundered her home because her husband fought against American troops at the battle of Moors Bridge in North Carolina. She too, had done nothing but be the spouse of an active Loyalist. Hugh Edward Egerton, ed., *The Royal Commission on the Losses and Services of the American Loyalists, 1783 to 1785, being the Notes of Mr. Daniel Parker Coke, M.P., One of the Commissioners during that Period* (Oxford: Oxford University Press, 1915), 226.

<sup>47</sup> Norton, “Loyalist Women,” 398.

<sup>48</sup> Kermes, “I Wish for Nothing More,” 41.

confiscation laws left the dowered property intact.<sup>49</sup> In part, permitting Loyalist wives to recover their dower stems from the eighteenth-century idea that women were apolitical and should not be punished for the political actions of their husbands, although it can also be seen as an attempt to bring Tory women over to the Patriots' side. Allowing the family to maintain some property also provided them with a chance of self-sufficiency. This, in turn, meant that Loyalist wives and their families would not have to resort to state or local poor laws and thereby become an even greater burden upon the state than their loyalism posed. In most cases, however, because of the web of legality enacted for property confiscation and the threats of violence, the wartime attempts of Loyalist wives to protect family property were not successful. In fact, from the spring of 1777 to the fall of 1778, to ensure the availability of Loyalist property, New Jersey forcibly removed numerous Tory wives behind British lines, thus making confiscation of Loyalist property a much easier process.<sup>50</sup>

Where Loyalist women played their most important role was not during the War, but in the post-war efforts at re-assimilation. In cases where such male family members as siblings, cousins, aunts, or uncles either fled the country or were already exiled, it often fell to those Tory women who remained behind to maintain the bonds of the family. This is aptly demonstrated in the correspondence of the Byles family of Massachusetts. Although the entire family was of Loyalist sympathies, sisters Katherine and Mary remained in Boston after the War while their father and brother fled to Nova Scotia. From the close of the War until their deaths in the early 1830s, the sisters maintained a

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<sup>49</sup> Kerber, *Women of the Republic*, 123-134.

<sup>50</sup> For the removals, see *Minutes of the Council of Safety of New Jersey* (Jersey City: John H. Lyon 1872), *passim*. One could also argue that removing Loyalist wives also protected them from Patriot aggression.

vibrant and frequent correspondence with their family that often dealt with everyday matters, such as the younger Mather's travels to Jamaica, as well as issues of greater importance, such as settling the estate of their father.<sup>51</sup>

The women of the Bayles family were not the only Loyalist women providing information to exiled members of the family. Rebecca Shoemaker apprised her exiled husband of the variance of attitudes towards Loyalists, informing him of the passage of "An Act to Preserve the Freedom and Independence" of New York state. New York City, she surmised, "must be a very disagreeable place to many." Yet, around the same time, she reported on the "considerably changed" attitude "with regard to the Loyalists" in Philadelphia.<sup>52</sup> Encouraging reports such as these made the decision to return easier and safer. And knowing the family members were waiting to receive them was a significant incentive.

Supplying information to family members or maintaining family connections was a vital element of the activities Loyalist women engaged in during post-war America, but they also made a critical contribution to reintegration in a legal capacity. Tory women were extraordinarily active in petitioning state governments on behalf of their male relatives. Their aims were to reclaim lost property, gain citizenship for them, or obtain special dispensations from anti-Loyalist legislation.<sup>53</sup> In some cases, Loyalist women sought the help of well-connected and politically powerful Patriots to secure acceptance

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<sup>51</sup> Mather Byles, Jr. to Katherine Byles, October 30, 1777; John Shepard to Katherine and Mary Byles, February, 1782; B. Walker to Mather Byles, Sr. August 23, 1786, in Byles Family Papers, Massachusetts Historical Society.

<sup>52</sup> Rebecca Shoemaker to Samuel Shoemaker, January 14, 1784, and December 13, 1783, Shoemaker Papers, Historical Society of Pennsylvania.

<sup>53</sup> See Cynthia Keirner's excellent work, *Southern Women in Revolution, 1776-1800: Personal and Political Narratives* (Columbia: University of South Carolina Press, 1998), 93-149.

of their petitions. This was exactly what Anne Burn did when she requested the help of Henry Laurens, the former President of the Continental Congress and politically well-connected South Carolinian. Although he was still in London securing the Definitive Treaty of Peace, Burn sought his influence in the recovery of her husband's property. In this particular instance, Laurens was unable to help, although he assisted other cases where Loyalist wives requested his assistance.<sup>54</sup> For instance, as Laurens was helping put the final touches on the Definitive Treaty in the fall of 1783, Mary Loocock requested his assistance in helping free her husband, Aaron, from South Carolina's confiscation and banishment acts. Obliging the "virtuous Woman and a heroine never shaken in her attachment to her Country," Laurens advocated for Loocock's name being stricken from the measures by attesting to Aaron's "merits as a Man . . . [and] his Zeal in our cause." Laurens influence was successful in removing Loocock's name from the confiscation and banishment measures, although the legislature did place a twelve percent amercement on his property.<sup>55</sup>

More than in any other state, the legislature of South Carolina received a large number of petitions from former Loyalist women seeking some sort of relief for a male relative. Historian Cynthia Kierner has shown that in 1783-1784 Loyalist women composed thirty-three percent of the petitions to the South Carolina legislature, while

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<sup>54</sup> Henry Laurens to Anne Burn, August 8, 1783 in David Chesnutt and C. James Taylor, eds., *The Papers of Henry Lauren*, 16 vols. (Columbia: University of South Carolina Press, 1968-2003), 16: 247-248 and n3 [hereafter cited, *Laurens Papers*]. Laurens was unable to help Burn because he visited his sick brother while in Paris.

<sup>55</sup> Henry Laurens to Mrs. Loocock, March 7, 1783, *Lauren Papers*, Kendall Collection; Laurens to John Lewis Gervais, September 9, 1783, in Laurens, *Papers*, 16: 333-335, quote from 333, 334. Laurens also helped Edward Fenwick. See his letters to the reverend Archibald Simpson, March 20, 1783, Laurens to the Governor of South Carolina, July 20, 1783, and Laurens to Edward Fenwick, July 20, 1783. *Lauren Papers*, Kendall Collection. Inexplicably, these letters are not contained in the 2003 edition of the *Lauren Papers* that cover this period.

they submitted thirty-one petitions to make up nearly fifteen percent of Georgia's legislative petitions. Several reasons explain why Loyalist women submitted so many of the petitions. First, rather simply, many of the men had yet to return from exile and could not represent themselves. It thus fell to their wives or other close female relatives to represent the family's interest before the legislature. While these exiled men could have relied upon another male relative to petition the government, assuming those relatives were not exiled, they rarely did so. Also, the common eighteenth-century perception of women being weak and in need of male protection meant that their petitions could possibly receive easier acceptance, as legislatures would be more sympathetic to the plight of women.<sup>56</sup> Having wives or female relatives submit the petitions also meant that they could educate the legislature on the republican values of their husband or relative. This was an important function since one of the critical attacks Patriot's leveled against Loyalists was their lack of the virtue required for republican government. By asserting her husband's or relative's virtue, a female relative could reshape this perception. Yet, at the same time, and perhaps without anyone realizing it, these petitions also provided most of these women access to the public sphere for the first time. Thus, the petitions can be viewed as among the first, if somewhat unintended, steps towards women gaining greater access in political arena – a process that would accelerate during the nineteenth century.<sup>57</sup> That these petitions came heavily from the South should not be surprising, since that region experienced the last area of fighting in the War. Furthermore, it was also the only area where royal government was restored in any real form during the conflict – in

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<sup>56</sup> Keirner, *Southern Women in Revolution*, 99-100.

<sup>57</sup> *Ibid.*, 93-149.

Georgia and South Carolina – meaning that once American’s regained control of those states they were last to carry out legislative punishments for loyalism.

The petitions, while similar to one another in purpose and form, often varied in their emotional tone, language, and method of persuasion. Martha Clifford petitioned on behalf of her son-in-law, William Creighton, asking the legislature to remove his name from the Banishment and Confiscation Acts and grant him citizenship and the “enjoyment of his Property and Protection of his Person.” Creighton was, his mother-in-law stated, “anxiously desirous of being permitted to return to the State and to become an American Subject.”<sup>58</sup> While Clifford’s petition for her daughter’s husband professed William’s desire to return, it contained a stiff formality and lacked any real emotion, despite covering an emotionally charged subject. By contrast, the petition of Ann Legge to the South Carolina legislature on behalf of herself and her banished husband Edward was story that was clearly intended to evoke emotion in its audience. Ann pleaded with the legislature to allow her husband to return and restore her family’s property, as “she is left with three helpless Children, whose whole dependence was on the Industry of her husband.” Should her request not be granted she feared “her family must be reduced to a Situation truly distressing.”<sup>59</sup> The helpless tone of Legge’s petition cannot be found in a plea from Mary Brown, the wife of Charleston merchant, Archibald Brown. With a matter-of-factness lacking in most Loyalist petitions, Mrs. Brown requested that her husband be removed from the Confiscation and Banishment Acts. Her husband’s only crime, she argued in her petition, was seeking British protection in Charlestown once the

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<sup>58</sup> Petition of Martha Clifford in Theodora J. Thompson and Rosa S. Lumpkin, eds., *The State Records of South Carolina: Journals of the House of Representatives, 1783-1784* (Columbia: University of South Carolina Press, 1977), 150.

<sup>59</sup> *Ibid.*, 15.

city fell in 1780. Although she admitted that he took a commission of Loyalist troops, he did so only to “keep peace in the Town.” Furthermore, he relinquished his command when ordered to send Patriot prisoners to James Island.<sup>60</sup>

Whether full of emotion or matter-of-fact formality the petitions from Loyalists women often succeeded in their intent. But although the South Carolina legislature granted most of the petitions from Loyalist women, including the three instances here, few were blanket erasures of their husband’s loyalism. Most successful petitions removed the Tory’s name from the list of banished Loyalist and/or stopped the confiscation of their property, but the legislature kept an amercement upon their property, albeit usually at a lower level.<sup>61</sup> While their taxes would be higher for a number of years, the ultimate outcome of these petitions was that Loyalists had just completed one critical step in the process of reintegration.

### **The Emotional Importance of Friendship in Revolutionary America**

While families played the most important role in the emotional life Loyalists and in their attempts to return to America, also performing a critical role in the process was the friendships between Loyalists and Patriots, as well as exiled Loyalists and those Tories who remained in America. The personal connections between friends became a chief motivator behind the Loyalist desire to become an American. Friends of Loyalists, whether Patriot or fellow Tories, served in both a personal and political aspects, as they offered emotional support, while also providing assistance and information on the prospects of returning.

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<sup>60</sup> *Ibid.*, 144.

<sup>61</sup> *Ibid.*, *passim*.

While historians have explored the role of families in early America, little attention has been devoted to friendship. Only in the past decade have early American historians made any serious initial examinations of the emotional role of friendship in the Revolutionary and early National period. Those studies that have examined friendship in the Revolutionary era have focused heavily on the political aspect of the relationship between Patriots with no attention given to Loyalists.<sup>62</sup> Progressive historian Merrill Jensen has been the only historian to look at friendships between Loyalists and Patriots and the responsibility these relationships played in reintegration. Yet, he mistakenly argued that only the “conservative,” elite wing of the Patriots used their influence to provide protection for their conservative elite friends.<sup>63</sup> As will be shown, this interpretation ignores the personal, emotional dimension of friendship and how it factored into reintegration.

Friendship in the eighteenth century contained strong emotional elements. In some ways, this emotional connection was similar to that within families. Friendship offered another emotional outlet from which an individual could escape the pressure of the outside world. It was, as one newspaper essay stated, “the great softener of human anxiety” that, as other essayist wrote, acted as a “healing balm, the harbinger of peace, and the messenger of joy.”<sup>64</sup> Yet, at the same time, the emotional bonds of friendship were fundamentally different from those within families. Familial connections were

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<sup>62</sup> Those works include Lance Banning, *Jefferson and Madison: Three Conversations from the Founding* (Madison: Rowman and Littlefield, 1995); Joseph J. Ellis, *Founding Brothers* (New York: Knopf, 2000); Stuart Leibiger, *Founding Friendship: George Washington, James Madison and the Creation of the American Republic* (Charlottesville: University Press of Virginia, 1999); and Andy Trees, *The Founding Fathers and the Politics of Character* (Princeton: Princeton University Press, 2004), 13-44.

<sup>63</sup> Merrill Jensen, *The New Nation: A History of the United States during the Confederation, 1781-1789* (New York: Vintage Books, 1950), 265-281.

<sup>64</sup> Anonymous, “On Friendship,” *Boston Gazette*, February 18, 1782; Anonymous, “Essay on Friendship,” *The United States Gazette*, February 19, 1784.



established by birth and expressed a much more obvious and necessary bond, while friendships were voluntary and considered by Revolutionary era Americans as “the greatest sweetner [*sic*] of human life” because of their voluntary nature.<sup>65</sup>

More than even the emotional importance of friendship, eighteenth-century Americans believed it served another purpose – as the foundation of society. To be sure, they understood the family as being the cornerstone of humanity, but if society were to be civilized and function properly, friendship had to be at the centerpiece. It was a common assumption in the Anglo-American world that man is a social creature. Following Locke, James Wilson explained, “we are fitted and intended for society, and . . . society is fitted and intended for us.”<sup>66</sup> And, at the core of society was friendship. “What constitutes our social happiness, and our civil peace, but friendship?” asked one author. It was friendship that supposedly bridged the gap between differences of opinion and allowed “the lion [to] lie down with the lamb; [where] contention is no longer heard, division healed, and union established.”<sup>67</sup> It was a society built upon the bonds of friendship that, as Thomas Paine said, “promotes our happiness positively by uniting our affections.”<sup>68</sup> Thomas Jefferson summarized the idea perhaps better than anyone when he wrote, “nature hath implanted in our breast a love of others, a sense of duty to them, a moral instinct, in short which prompts us irresistibly to feel and to succor their distresses.”

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<sup>65</sup> *Ibid.*

<sup>66</sup> John Locke, *Second Treatise of Government*, C. B. Macpherson, ed. (Indianapolis: Hackett Publishing Company, 1980), 42-68; James Wilson, *Lectures on the Law*, quoted in Jan Lewis “‘Those Scenes for Which Along My Heart was Made:’ Affection and Politics in the Age of Jefferson and Hamilton,” in Peter Sterns and Jan Lewis, eds., *The Emotional History of the United States* (New York: New York University Press, 1998), 52-65.

<sup>67</sup> *Ibid.*

<sup>68</sup> Thomas Paine, *Common Sense*, Isaac Kramnick, ed. (New York: Penguin, 1976), 65.

Jefferson went on to add that “[t]he Creator would indeed have been a bungling artist, had he intended man for a social animal, without planting in him social dispositions.”<sup>69</sup>

### **Patriot and Loyalist Friendship during the Revolution**

Because friendship and civil society were so intertwined, Revolutionary-era ideas about friendship implied a general dissatisfaction with politics in particular and government in general.<sup>70</sup> Not surprisingly, this dissatisfaction is palpable in the private letters of both Loyalists and Patriots who were trying to escape the turmoil of the Revolution and retreat into the social bonds of friendship. Samuel Curwen was not alone in his thinking when he lamented in his diary that “nothing but the hopes of once more of visiting my native soil, enjoying my old friends within my own little domain” was the only thing that “supported my drooping courage.”<sup>71</sup> Friendship could sometimes transcend tumults and differences in opinion, but during the Revolution this was to difficult to do. The Revolution was simply too momentous an event, in which sides had to be taken. An inevitable side-effect of the Revolution was political differences between close friends. Often, the disagreement in political sentiments caused tension and emotional pain between Patriot and Tory friends and was a motivating force behind some Loyalists and Patriots declaring neutrality in the contest. The fear of being separated not just from their family – which could be temporary if the rest of the family eventually

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<sup>69</sup> Thomas Jefferson to Thomas Law, June 13, 1784 in Andrew Lipscomb, ed. *The Writings of Thomas Jefferson* 20 vols (Washington, DC: Government Printing Office, 1904-1905), 13: 142.

<sup>70</sup> This is theme of Lewis, “Affection and Politics.”

<sup>71</sup> Samuel Curwen, Diary entry for December 31, 1777 in George Atkinson Ward, ed. *Journals and Letters of the Late Samuel Curwen* (New York: C.S. Francis and Company, 1842), 46-47 [hereafter Curwen, *Journal and Letters*]. Also see William Browne to Curwen, January 8, 1776, in *Ibid.*, 48; The exchange of letters between James Parker and Charles Steuart, 1776-1781, in the Parker Family Paper Liverpool Record Office, Colonial Williamsburg Foundation); Van Shaack to Theodore Sedgewick, August, 13, 1778, in Van Shaack, *Life of Peter Van Schaack*, 118-119; Thomas Hutchinson to Colonel Worthington, Mache 6, 1775, in Peter Orlando Hutchinson, ed., *The Diary and Letters of Thomas Hutchinson* (Boston: Houghton, Mifflin, Co., 1884), 398.

followed – but from friends who happened to have different political views was yet another emotional burden Loyalists had to carry with them.

One of the most poignant and notable examples of how the Revolution affected friendships can be found in the exchange of letters between Peter Van Schaack and John Jay. Having just suffered the death of his children and his wife, in the late summer of 1778 Van Schaack also faced the termination of his long and very close friendship with Jay due to their clashing opinions regarding the Revolution. Describe friendship here. While Van Schaack expressed his friendship with other Patriot friends in what he thought were his waning days in America, in his letter to Jay, there was noticeable angst and bitterness.<sup>72</sup> Importantly, these feelings were not in response to something his Patriot friend had done. Rather, these emotions stem from the various turmoil, both personal and political, that Van Schaack had experienced in the past year, including the loss of two of his children and his beloved wife as well as being forced into exile because of his Loyalism. In other words, Van Shaack used his friendship with Jay to voice what must have been pent up feelings. Evidence Thus, Van Schaack thought he should explain his decision to remain loyal because he “owe[ed] it to the friendship which formerly subsisted between us.” Just the idea that he could defend his motivation to his Patriot friend demonstrates both the level of their friendship and the importance it played in their lives.<sup>73</sup> Unfortunately, Jay’s response, if he wrote one, has not been found, but one can suppose with some degree of certainty that Jay must have been pained by the potential

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<sup>72</sup> Van Shaack to Theodore Sedgewick, August, 13, 1778, in Van Shaack, *Life of Peter Van Schaack*, 118-119.

<sup>73</sup> Peter Van Schaack to John Jay, August 14, 1778, in *ibid.*, 121.

loss of such a close friend, a pain that surely felt more intense when Van Schaack fled to England soon after sending his letter.

The friendships between Patriots and Tories were not automatically destroyed because of the Revolution. In fact, there was a noticeable and conscious attempt among these politically different friends to maintain their bonds despite the political upheaval. Jay, even while receiving Van Schaack's emotional letter, attempted to maintain his friendship with James DeLancey, the noted New York loyalist. Jay assured his friend that "notwithstanding" the differences in "the present contest, the friendship which subsisted between us is not forgotten, nor will the good offices formerly done me by yourself . . . cease to [receive] my gratitude."<sup>74</sup> In attempting to maintain their friendship, one friend would attempt to persuade the other to join his side. These attempts at wooing their friends to their side was done not just to have more support for their cause, but also from the emotional connections the friends shared. It was their attempt to protect their friend from potential violence, grief or some other pain. It was, in fact, an ultimate act of emotional friendship – pleading and begging a friend to see reason in the face of great harm. In late 1774, as imperial events approached outright war, Joseph Palmer begged his friend Thomas Flucker to abandon English tyranny and join the side of American liberty. "The man who watches the event in order to join the victor," Palmer prophesied, "will certainly be despised by both." By staying with the

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<sup>74</sup> John Jay to James DeLancey, January 2, 1778, *The Papers of John Jay* Online Edition, Columbia University Libraries < <http://www.columbia.edu/cgi-bin/cul/resolve?AVE8231>>. Accessed on January 28, 2008.

Tories, Palmer feared his friend would face “unrelenting fury” that would make him or any other sufferer wonder “if there is a hell on Earth, this is the thing.”<sup>75</sup>

It is not known just how many politically separated friends switched sides during the Revolution because of the pleadings of friends. Whatever the number, it does not appear to have been very large; it seems that when an individual made a serious commitment to one side, that loyalty remained firm. Even if a friendship did not lead to the switch of sides, it could be used in other valuable ways. Very often, Patriot friends provided protection to their Tory friends. Sometimes this protection consisted of providing advice to their Tory friends on how to escape potential harm of Patriot persecution.<sup>76</sup> More often, however, this protection came from letters sent to political leaders informing them of the good character of their Loyalist friends and seeking some sort of legal dispensation for them.<sup>77</sup>

During the Revolution, the friendships between Patriots and Loyalists underwent the most severe of tests, and in many cases those bonds were severed because of the political differences. At the start of the military conflict, Benjamin Franklin wrote to his longtime friend and member of Parliament, William Strahan. Franklin noted with devastating anger that “You are a member of Parliament, and one of that Majority which has doomed my Country to Destruction. You have begun to burn our Towns, and murder

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<sup>75</sup> Joseph Palmer to Thomas Flucker, September 1774, in Benjamin Pickman Papers, Phillips Library, Peabody Essex Museum.

<sup>76</sup> John Frear to Peter Leroy, Sr., no date [although likely 1775] in *Year Book of the Dutchess County Historical Society* 12 (1927): 39-41; Timothy Pickering to Mehetable Higginson, Philadelphia, June 19, 1782, Robie-Sewall Papers, Massachusetts Historical Society; Joseph Orne to Pickering in Octavius Pickering, *The Life of Timothy Pickering* 2 vols. (Boston: Little, Brown, and Company, 1867), 1: 364-365.

<sup>77</sup> Archibald McClaine to Governor Burke, February 9, 1781 in Clark, *State Records of North Carolina*, 534-535; “Memorial of James Iredell on behalf of Henry Eustice McCulloh February 2, 1779 in Don Higginbotham, ed., *The Papers of James Iredell*, 3vols. (Raleigh: Office of Archives and History, North Carolina Department of Cultural Resources, 1976-2003), 2: 74-78; John Adams to Oliver Wendell, November 14, 1779, Papers of John Adams, Vols. 8-10 edited by Lint, Gregg L., and Robert Taylor (Cambridge, London: 1989), 9: 332. Mass, “Return of the Massachusetts Loyalists,” 409, 411-413.

our People. Look upon your Hands! They are stained with the Blood of your Relations! You and I were long Friends: You are now my Enemy.”<sup>78</sup> North Carolina Loyalist, James Kerr appealed to Griffith Rutherford, a close friend and member of the state legislature. Hoping his Patriot friend could assist him in staying in North Carolina, Kerr found his expectations dashed when Rutherford refused. Bluntly, the North Carolina legislator told Kerr that “you were deffe to my advice at the time,” and by joining the side of treason he could receive no assistance. “As an open enemy,” Rutherford informed Kerr: “you must know that you deserve [no relief], for if a blast of youre mouth Would have Annehelated [*sic*] the 13 United Stats We have a right to believe you would have done it.” The only advice Kerr received from his former friend was to relocate to “Novescho [Nova Scotia] where I understand the Royal Brut, of Brittan has made provision for all his Loyalists in North America.”<sup>79</sup>

In the early years of peace, while Loyalists contemplated leaving American shores, or, in the case of exiles, return to their homeland, their emotional bonds to friends, like the ones they shared with their families, played a large part in their decision to return. But unlike family, where the bonds of affection were deep and lasting because of the natural blood ties, Loyalists often saw a need to reaffirm their connection with the Patriot friends. Loyalists were careful, too, to reassure their Patriot friends that their relationships remained strong and affectionate despite the serious political differences that existed between them. While in exile, Philip Skene wrote one Patriot friend asking him to express to mutual friends his desire to return. “I make no doubt,” Skene wrote,

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<sup>78</sup> Benjamin Franklin to William Strahan, July 5, 1775 in Ellen R. Cohn, *et al*, eds., *The Papers of Benjamin Franklin*, 38 vols. to date (New Haven; Yale University Press, 1959 - ), 22: 85

<sup>79</sup> Griffith Rutherford to James Kerr, July 22, 1783, Griffith Rutherford Papers, North Carolina State Archives; John Maass, “‘A Complicated Scene of Difficulties:’ North Carolina and the Revolutionary Settlement, 1776-1789.” Ph.D. Dissertation The Ohio State University, 2007), 397.

“of assuring all my friends through you that it is my first wish to become resident in the United States.”<sup>80</sup> When he returned, Skene reported that it would “be an additional pleasure to me, to convince” his friends and hometown into “forgetting every thing disagreeable, which I hope they will have reason to do, nothing shall be wanton on my part to contribute to their welfare and the good of the country.”<sup>81</sup> While Skene wrote about his desire to return, Joshua Upham, a friend of Timothy Pickering, a quartermaster of the Continental Army, wrote his Massachusetts friend before leaving the country. Upham wanted to remind Pickering that despite the “late unhappy publick contest” his affection for his friend remained. With noticeable emotion, Upham told Pickering that “I need not assure you that a look back at our former friendship [brings] much pleasure – it is not possible that differences in opinion on national questions would have abated private friendship.” Upham told his Patriot friend that despite his leaving America, he hoped “at some future period not far distant to meet you in peace and quiet when every personal animosity and individual resentment shall be forgotten by all parties . . . of our Countryman.”<sup>82</sup> Likewise, when James Bowdoin learned that his friend, Thomas Pownall, one of the last royal governors of Massachusetts, was considering returning to the state, he exclaimed that one of “the agreeable consequences that are likely to arise” from the visit would be the “pleasure to see our old friend.”<sup>83</sup> And Patriot Leader Theodore Sedgwick wrote his Loyalist friend Henry Van Schacck (the brother of Peter) about how the war affected their relationship. He assured his Tory friend that

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<sup>80</sup> Philip Skene to Elisahama Toswer, July [16?], 1784 in John William Papers, New York State Library, Box 3, folder 26.

<sup>81</sup> *Ibid.*

<sup>82</sup> Joshua Upham to Timothy Pickering, November 18, 1783, in The Timothy Pickering Papers, Massachusetts Historical Society, Reel 18.

<sup>83</sup> James Bowdoin to Thomas Pownall, November 20, 1783, in *Collections of the Massachusetts Historical Society* Seventh Series, vol. 6 (1907): 21-23. 21-22 [hereafter cited, Bowdoin and Pownall Papers].

no distance of time, or opposition of political opinions has had the most remote tendency to obliterate those feelings of esteem and affection which I am happy in having entertained for you. Believe me, that I reflect with sensible pleasure and satisfaction on those few characters who have directed their polity pursuits not by object of interest but of principle, and I hitherto have, and sincerely hope I ever shall have the same regard for such character whether I can keep them company or whether distance or accident has separated me. Such men, however different their principles, will always propose the attainment of the same object- the general happiness of the community with which they are connected.<sup>84</sup>

Perhaps the most famous reconciliation of a Patriot and Tory friendship was the between Jay and Van Schaack. The entire episode of their reconciliation demonstrates the significance an affectionate and emotional friendship played in the desire of Loyalists to become a part of the new nation. The initial steps at reestablishing their friendship occurred in the summer of 1782 while Jay was in Spain on a diplomatic mission and Van Schaack lived in exile in London. In a truncated yet emotionally charged letter, Van Schaack admitted to being “embarrassed” by the “strange predicament we stand in to each other, compared to our connection in earlier life.” Because he did not know where he stood in his former friendship with Jay, he refused to transform the letter into a plea to re-establish their connection. While Van Schaack thought he was merely testing the waters of Jay’s friendship, he subverted this intent by closing the letter with his belief that “the artificial relations introduced by a state of society, may vary, or be dissolved by events and external circumstances; but there can be others which nothing but deviations from moral rectitude can, I think, annihilate.” In other words, the political upheaval of the Revolution may have altered the “state of society,” yet the friendship between both men could withstand the alteration.<sup>85</sup> Jay responded immediately to Van Schaack’s letter

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<sup>84</sup> Theodore Sedgwick to Henry Van Schaack, March 24, 1783, in Henry Cruger Van Schaack, ed., *Memoirs of the Life of Henry Van Schaack, Embracing Selections from His Correspondence during the American Revolution* (Chicago: A. C. McClurg and Co., 1892), 91.

<sup>85</sup> Peter Van Schaack to John Jay, August 11, 1782 in *Life of Peter Van Schaack*, 1: 301.



with his own emotionally laden letter. Clearly expressing remorse at the suffering of Van Schaack and other moral and conscientious Loyalists, he told his exiled friend, “believe me, my heart has nevertheless been, on more than one occasion, afflicted by the execution of what I thought, and still think, was my duty.” Jay went on to tell Van Schaack that “my regard for you, as a good old friend, continued notwithstanding.” Yet, as Jay explained

Your judgment, and consequently your conscience, differed from mine on a very important question; but though as an independent American, I considered all who were not for us, and you among the rest, as against us; yet be assured that John Jay did not cease to be a friend to Peter Van Schaack.<sup>86</sup>

Van Schaack’s subsequent letter demonstrated his relief in re-establishing his friendship with Jay. With these initial exchanges of letters, the two friends began to renew their close friendship. While Jay labored in Paris trying to secure the peace, Van Schaack remained in London. Although Jay’s work in Paris temporarily kept him from visiting his friend, the two maintained a vibrant correspondence. Finally, in October 1783 Jay made his way to London where, after nearly five years of not seeing one another, Jay visited his exiled friend with noticeable excitement. Van Schaack recorded the incident in his diary: “We met with the cordiality of old friends, who had long been absent, without the least retrospect to the cause of that absence.” In 1785, when Van Schaack returned to his home in New York, Jay was waiting at the pier and even boarded the ship to help his friend disembark. Van Schaack reported to his sister that he was “the

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<sup>86</sup> Jay to Van Schaack, September 17, 1782, in *ibid.* 301-302.

happiest of men.”<sup>87</sup> Van Schaack and Jay would maintain a strong friendship until the former’s death in 1827.

Along with reconciliation, the friendship between Patriot and Loyalist assisted Tories in their efforts at returning to America. As during the war, Loyalists often turned to their Patriot friends seeking advice on when, or if, they could return or to obtain some assistance to protecting their property. A great example of how Loyalists friends requested the assistance of their Patriot friends is the case of Thomas Pownall and James Bowdoin. When Pownall first expressed his desire to return to Massachusetts, one of the first questions he asked Bowdoin was “how a traveler like myself, how I myself would be received, and whether permitted to travel with the same liberty that one may in Europe” or would he “expect to experience many occasions of humiliating treatment?”<sup>88</sup> Later, when Pownall was unable to travel to Massachusetts and remained in France, he rather oddly requested Bowdoin’s assistance in obtaining a Lieutenant Generalship in the state’s militia. Such a rank, Pownall assured his Patriot friend, would demonstrate to his honor to Europeans to be a member of “the country which will one day or the other adopt me.”<sup>89</sup>

Patriot friends aided in other ways as well. As been shown, Alexander Hamilton, James Wilson, and Jared Ingersoll, Jr., offered their considerable legal talents to exiled Loyalists trying to recover debts or property. In other cases, Patriots offered help to those Loyalists who remained in the country. In New York City, as the British prepared to

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<sup>87</sup> *Ibid.*, 313; Van Schaack to Jane Silverster, exact date unknown, but clearly 1785, as he discusses his recent landing which was in that year. *Ibid.*, 389-390.

<sup>88</sup> Pownall to Bowdoin, February 28, 1783, in “The Bowdoin and Temple Papers,” 3-6, quote on 4-5.

<sup>89</sup> Pownall to Bowdoin, January 11, 1784, in *Ibid.*, 27. Bowdoin repeated his request two other times, once to Pownall in a separate letter also dated January 11, 1784, *ibid.*, 31. The quote is taken from this letter. And again to an unknown recipient, *ibid.*, 32-33. Much to his chagrin, Pownall never received the commission.

evacuate the city, George Washington received a request from Andrew Elliot, a well-known Loyalist. Elliot asked the American General if he would call upon his daughter, Eleanor Jauncey. Washington granted the request and after reporting on the well-being of Elliot's daughter, Washington assured the former New York judge that he "shall be happy in occasions of rendering her any service which may be in my power."<sup>90</sup> British sympathizer Philip Porcher received word while exiled in London that his father, who had remained on the family estate in South Carolina, was being forced by that state's legislature to testify before it so as not to have his property confiscated. Porcher was told that because of his father's "Universal Good Character" he had "great many Powerful Friends" in the legislature that would help make sure the family's property remained intact, which it did.<sup>91</sup> Sometimes that assistance was not exactly what the Loyalist had hoped for. James Iredell advised his cousin, Henry McCulloh, his chances of recovering his confiscated property were slim as the estate was simply too big and his cousin's Loyalism made him too tempting a target.<sup>92</sup>

Because New York City served as the headquarters of the British army and was the main location for Tory refugees, New York Governor George Clinton received many requests from Loyalists seeking some favor or protection from potential Patriot abuse. Cadwallader Colden, the long time lieutenant governor of the colony and one of its last royal governors, made a special plea to the Patriot governor. Colden requested that the government of New York show mercy and leniency both to him and others who remained

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<sup>90</sup> George Washington to Andrew Elliot, December 1, 1783, in John C. Fitzpatrick, ed., *The Writings of George Washington from Their Original Manuscript Sources, 1745-1799*, 39 vols. (Washington, D.C.: Government Printing Office, 1931-1944), 27: 251-252.

<sup>91</sup> Stephon Mazyck to Philip Porcher, June 14, 1783, in *South Carolina History and Genealogical Magazine* 38 (1937): 11-15.

<sup>92</sup> James Iredell to Henry E. McCulloh, November 28, 1783, in Don Higginbotham, ed., *The Papers of James Iredell*, 3 vols. (Raleigh: Division of Archives and History, 1976-2003), 2: 467-469.

loyal to the crown. The former royal governor believed Clinton would do everything in his power to make sure Loyalists were not molested. Colden based his faith in Clinton on their “long and intimate acquaintance, (even from your Childhood),” believing that their personal connection would override any political difference. Colden reminded the Patriot Governor that “[h]owever materially you and I may have differ’d for some years past, in our political sentiment, yet there are other Sentiments more essential to Society and the happiness of man with man,” namely the friendship that existed between them.<sup>93</sup>

Such incidents in which Patriots assisted their Loyalist friends have led some historians, particularly the Progressive historian, Merrill Jensen, to view this as nothing more than the aristocratic elements of the American Whigs assisting their aristocratic and ideologically similar Tory brethren. This support, moreover, was done, in part, as a reaction to the popular forces working to expel Loyalists from the country.<sup>94</sup> To a small degree, this is true, as many Loyalist shared similar political and ideological beliefs – although they could not support independence. For example, Timothy Pickering told Mehetabel Higginson upon her return that the “powerful support such numbers of gentlemen of the first characters & influence in Massachusetts, who are your friends” would provide all the protection she needed if harassed “from such worthless characters . . . who conscious of their infamy, greedily seize every opportunity of acquiring some little popularity . . . to cover their reproach.”<sup>95</sup> Statements like these serve as the proof that such a quasi-conspiracy was afoot. Yet, Jensen’s argument, and those who follow

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<sup>93</sup> Cadwallader Colden to George Clinton, July 26, 1783, in Hugh Hastings, ed., *The Public Papers of George Clinton, First Governor of New York, 1777-1795, 1801-1804*, 10 vols. (Albany: Oliver A. Quayle, 1904; reprint, New York: AMS Press, 1973), 8: 221-224.

<sup>94</sup> Jensen, *The New Nation*, 265-281.

<sup>95</sup> Timothy Pickering to Mehetabel Higginson, Philadelphia, June 19, 1782, Robie-Sewall Papers, Massachusetts Historical Society.

some variation of it, ignores the most important part of the Patriot's assistance to Loyalists in post-war America: friendship. As noted earlier, a vital part of friendship in the eighteenth century was its ability to transcend political differences and serve as a calming retreat from public tumult. Part of this understanding of friendship was that assistance – either public or private – should always be provided to friends who needed it; and no one needed more help in the immediate post-war years than returning Loyalists. Jan Lewis has shown how, by the 1790s, this public dimension of friendship was showing signs of privatization as a result of the union between the republican belief of meritocracy and the fear that personal affection would force private interest above that of the nation.<sup>96</sup> In the aftermath of the war, however, the traditional idea still held strong. Therefore, what looked like a cynical attempt at maintaining an aristocratic element in the new democratic country was, in actuality, the realizations of the emotional dimensions of friendship.

### **Friendships between Loyalists**

The friendships between Patriot and Loyalists provided an important emotional reason and element for re-assimilating. As necessary and vital as it was, in the process of reintegration, however, it was the friendships between exiled Loyalists and those who stayed in America that were the most important. Just as emotional as the relationships between Whig and Tory, the friendships between Loyalists offered encouragement for exiled Loyalists to return. These friendships also provided valuable information as to the potential welcome or hostility awaiting a returning Loyalist.

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<sup>96</sup> Lewis, "Affection and Politics."

But during the war, these friendships also remained central. Salem resident and Loyalist William Pynchon provided care the wife of his friend, the exiled Loyalist, Samuel Curwen. Pynchon also provided legal advice to other Loyalists and collected debts for them.<sup>97</sup> Another Massachusetts Loyalist, Samuel Rogers, acted as the legal representative for several Tories and served as an unofficial mailman, delivering letters from exiled Loyalists.<sup>98</sup> In the British controlled areas, Loyalist refugees migrated to existing or newly created friendships, which became one of the chief ways these Tories were able to cope emotionally with what was a rough and often desperate situation.<sup>99</sup> The same was true, if not more so, for exiled Loyalists. While exiled, Loyalists often formed social clubs consisting of members from the same or neighboring colonies, who attended activities together, toured London and the rest of England, and some even traveled to Europe. These connections to one another were the only method they had to maintain their spirits and their hope for a return to their home.<sup>100</sup>

While property and debts may or may not be recovered, and were, of themselves, key reasons for returning, it was the re-establishment of affectionate connections that provided the most important impetus. Although most Loyalists “wish [for] nothing more ardently upon earth, than to see my friends and country again in the enjoyment of peace, freedom and happiness,” most exiles still hesitated to return, worried that the anti-

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<sup>97</sup> Fitch Edward Olliver, ed., *The Diary of William Pynchon of Salem: A Picture of Salem Life, Social and Political, A Century Ago* (Boston: Houghton Mifflin, 1890), *passim*.

<sup>98</sup> Kermes, “I Wish for Nothing More,” 48.

<sup>99</sup> Van Buskirk, *Generous Enemies*, 8-44.

<sup>100</sup> Mary Beth Norton, *The British-Americans*; David E. Mass, “The Return of the Massachusetts Loyalists” (Ph.D. diss, University of Wisconsin, 1972), 338-394.

Loyalist sentiment and laws would either prevent their return or expose them to dangers once they arrived.<sup>101</sup>

Their connections with those Loyalists who stayed in America provided much-needed information on the ability to safely return to America. As noted, some Patriots provided similar information, but the news that came from American Loyalists served either to buttress previous reports, or, in cases where the close friends of exiled Loyalists were other Loyalists, to provide much needed and desired intelligence. One of the reasons Curwen returned to America was because of the news received from his friend, William Pynchon. He reported to Curwen in the first few days of 1784 that while there appeared to be no sign of the repeal of anti-Loyalist laws, it was still safe for him to return. To add further encouragement, Pynchon noted how after making “inquiry among your friends, and all agree” to be “very desirous of your returning in the spring.”<sup>102</sup> Bela Hubbard reported similar news to Samuel Peters, informing the Anglican minister on the health and status of his family and reported that Connecticut had not confiscated estate. Hubbard also speculated that if Peters wanted to establish a church in the state, he probably could. “A bishop might easily come into Conn[ecticut] provided there as not formal application mad to the Assembly.”<sup>103</sup>

In another instance, William Smith, a New York Loyalist who served as an advisor to British General George Carleton, wrote Governor Clinton asking him to

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<sup>101</sup> For an example of this fear see Samuel Curwen to William Pynchon, November 28, 1783, in Curwen, *Journal and Letters*, 393. The quote is from Isaac Smith to the Reverend William Smith, Enfield near London, December 5, 1775, in H. Lyman Butterfield, ed., *Adams Family Correspondence*, 2<sup>nd</sup> Series, 2 vols. (Cambridge: Harvard University Press, 1963), 1: 124.

<sup>102</sup> Pynchon to Curwen, January 2, 1784, in Curwen, *Journal and Letters*, 397.

<sup>103</sup> Bela Hubbard to Samuel Peters, January 21, 1784, in Kenneth Walter Cameron, ed., *The Papers of Loyalist Samuel Peter: A Survey of the Contents of His Notebooks- Correspondence during His Flight to England, Exile, and the Last Years of His Life* (Hartford: Transcendental Books, 1978), 25

intercede on behalf of his friend, Dr. Richard Bayley. Apparently, Smith had received word about the potential harm some New York Patriots may visit upon Dr. Richard Bayley. Smith sought the Governor's help in insuring that this "certain sett of men" were not able to "indulge their malevolence" again Bayley. Smith even provided character testimony by attempting to show how Bayley, although a Loyalist, was not violent towards America and had, in fact, determined to remain in New York as a citizen.<sup>104</sup>

Once Loyalists returned, they quickly re-established their friendships with other Loyalists and Patriots. When exiled Loyalist Thomas Robie chastised his daughter for not writing more often since her return to Massachusetts, she defended her paucity of letters by describing how "we have been so much engaged in receiving the congratulations of our friends here on our return."<sup>105</sup> Other Loyalists reunited with both their Patriot and Tory friends and lived out the rest of their lives in close connection with their family and friends. The exuberance that Loyalists experienced in re-establishing their emotional bonds with their family and friends upon returning serves as strong evidence of the emotional dimensions of everyday life in Revolutionary America. In the eighteenth century, both friends and family were the refuge from the storms of public life. They provided the emotional significance of daily life as parents took pride and joy in their offspring and friendships provided an outlet into a world that transcended the often-mean and vicious arena of politics. With the Revolution, these bonds were severely tested as families were torn apart either through exile or from their political decisions while friendships were sometimes unable to overcome – if only temporarily – the truly

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<sup>104</sup> William Smith to George Clinton, October 20, 1783, in Hastings, ed., *The Public Papers of George Clinton*, 8: 265-266. Included in the letter to Clinton was an epistle from Silas Holmes to William Smith, September 29, 1783, discussing the Dr. Bayley affair. Smith also noted in his letter that he had appealed to Clinton once before on behalf of a Mr. Malcom. The letter is not in Clinton's published papers.

<sup>105</sup> Mary Robie to Thomas Robie, Marblehead, August 1 and August 20, 1784, Robie-Sewall Papers.



revolutionary nature of the Revolution. Thus, when viewing the Revolution on the personal level what stands out is the significant degree of emotional pain the Revolution brought. And it was Loyalists who experienced the greatest proportion of this grief, as it was they who were separated from their families and friends, often by force or necessity. After the war, however, these bonds of affection became a driving force behind Loyalists returning to America, as Tories relied upon family and friends to assist in their return. Therefore, the reintegration of the Loyalists was more than just legal and ideological effort. It was also a personal and emotional struggle.

### Chapter 3

#### The Treaty of Paris, the Confederation, and the States: The Issue of Federalism and the Reintegration of the Loyalists

The desire to live amongst family and friends was an undeniable incentive for Loyalists to re-assimilate. Yet, the decision was not theirs alone; Americans had to decide whether to re-admit them into the polity. Before determining which, if any, former Loyalists would be allowed reentry, Americans had to decide who would be responsible for creating any potential reintegration policy, the Confederation Congress or the individual states. The initial steps in this decision-making process came with concluding peace with England. The Treaty of Paris, finalized on September 3, 1783, established American independence, but it certainly did not end many of the important issues the Revolution created, particularly whether to accept or expel England's colonial supporters during the war. Yet, the war's conclusion and the Treaty's reception forced states to consider the ramifications of having Loyalists remain in country as viable members of the community. Integral to the issue of reincorporating Tories was the locus of responsibility for that assimilation: the Confederation Congress or the individual states. In other words, the reintegration of Loyalists was an issue of federalism. In fact, the question of federalism and the nature of the American union was the single most important topic for Tory assimilation, as it forced the subject of responsibility for reintegration. From this issue flowed all other questions, problems, and solutions of repatriating Loyalists. But during the war the subject of reintegration remained an unsettled and unasked. After securing the Treaty of Paris and Articles Four through Six

of the Treaty, which dealt specifically with the Loyalists, the task for both the treatment and reintegration of the Tories came to the fore.

The broad focus of the next two chapters is the relationship between federalism and the reintegration of the Loyalists. To explore the topic, this chapter concentrates on the imperial origins of federalism, the relationship between Congress and the States regarding the Loyalists, and, most importantly, the problem that federalism caused in negotiating the Loyalists measures of the Treaty of Peace. The next chapter examines the American reception and ensuing debate on the Treaty. It centers on how, once the treaty reached American shores, all across the country a debate ensued over the responsibility of the treaty's enforcement, leading to two groups. One argued in favor of state rights, asserting that the Loyalist measures of the treaty violated the sovereignty and independence of the individual states, while the other group contended that the Continental Congress had the ability to implement the treaty with enforcement being a part of national honor and trust. Both chapters, however, argue that while the Confederation Congress may have possessed authority over enacting and implementing treaties, the budding and unstable nature of federalism left the power and enforcement of the treaty to the states. What is more, the states' authority regarding the enforcement of the Treaty was of paramount importance to the reintegration of the Loyalists. Each state could accept or reject former British supporters at its own pace and accord rather than endure coerced assimilation of people that it was not ideologically, legally, or otherwise ready to receive.

## **The Imperial and Revolutionary Origins of American Federalism**

Federalism, the distribution of political power across several different levels of governments, transformed during the Revolution from a imperial tradition to a constitutional principle. The roots of American federalism extend back into its imperial history, when the colonies were still English possessions.<sup>1</sup> While England, or Parliament, in particular, claimed supremacy over the colonies, the title was titular at best, and, before 1765, non-existent. Instead, and because of England's lax oversight, the colonies developed according to their own local desires, needs, and interests. Within broad parameters, England allowed the American colonies to develop their own laws and governmental functions despite efforts and plans throughout the colonial period to unite the colonies.<sup>2</sup> This essentially permissive attitude towards colonial development, the degree to which neither the colonies or Britain realized, provided each colony with time to develop its society and institutions. While it is true that by the mid-eighteenth century most of England's North American colonies had become Anglicanized in dress, style,

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<sup>1</sup> David Hendrickson, *Peace Pact: The Lost World of the American Founding* (Lawrence: University Press of Kansas, 2003); Jack P. Greene, "The Imperial Roots of American Federalism," *This Constitution* 6 (1985): 4-11 and "The Background of the Articles of Confederation," *Publius* 12 (Autumn, 1982): 15-44; Andrew C. McLaughlin, *The Foundations of American Constitutionalism* (New York: New York University Press, 1932) and "The Background of American Federalism," *The American Political Science Review* 12 (May 1918): 215-240.

<sup>2</sup> Mary Sarah Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (Cambridge: Harvard University Press, 2004). Also see Daniel J. Huselbosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664-1830* (Chapel Hill: University of North Carolina Press, 2005); William E. Nelson, "The American Revolution and the Emergence of Modern Doctrines of Federalism and Conflict of Laws," in *Law in Colonial Massachusetts, 1630-1800* (Charlottesville: University of Press of Virginia, published for The Colonial Society of Massachusetts, 1984): 419-467. Still relevant is Charles M. Andrews, *England's Commercial and Colonial Policy*, vol. 4 of *The Colonial Period of American History* (New Haven: Yale University Press, 1934-1938).

To be sure, England had some oversight over its American colonies through its appointment of royal governors, the mercantile system, and the veto ability of the Board of Trade. All I am contending here is that, generally speaking and on a day to day basis, the colonies were left to their own devices. For the various plans to unite the colonies, see Viola F., *The Dominion of New England: A Study in British Colonial Policy* (New Haven: Yale University Press, 1923); David S. Lovejoy, *The Glorious Revolution in America* (Hanover, NH: Wesleyan University Press, 1972; 2<sup>nd</sup> ed. 1987), esp. 177-250 and especially Oline Carmical, Jr., "Plans of Union, 1643-1783: A Study and Reappraisal of Projects for Uniting the English Colonies in North America" (PhD Dissertation: University of Kentucky, 1975).

political thought, and legal forms, they were nonetheless still far different from one another in political experiences, ethnic diversity, religions, and economies.<sup>3</sup>

England's historic victory in the Great War for Empire left the newly expanded empire in significant debt. To ease this burden, Parliament began overtly to assert over the colonies the supremacy it had claimed in theory, result in the passage of the 1765 Stamp Act and the 1767 Townshend Act and the creation of the imperial crisis.

Parliament's post-war attempts to bring the colonies under tighter imperial control demonstrated, for the first time really, the federalist nature of the British Empire by exposing to both sides just how leniently England had governed the colonies for the prior century and half. While the American colonists relied on English constitutionalism to combat most of the Parliament's measures, embedded in the American resistance were varying ideas of federalism.<sup>4</sup> From Richard Bland's 1764 argument against the Two Penny Act to the attacks against the Stamp Act by Rhode Island Governor, Stephen Hopkins, and Maryland lawyer and future Loyalist, Daniel Dulany, and, finally, to John Dickinson's 1767-68 essays, *Letters from a Farmer in Pennsylvania*, colonial political thinkers asserted that, as Hopkins put it, "each colony hath a legislature within itself, to

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<sup>3</sup> For the "Anglicization" argument see John Murrin, "Anglicizing an American Colony: The Transformation of Provincial Massachusetts" (PhD Dissertation; Yale, 1966); Rhys Isaac, *The Transformation of Virginia, 1740-1790* (Chapel Hill: University of North Carolina Press, 1982); Jack P. Greene, "An Uneasy Connection: An Analysis of the Preconditions of the American Revolution" in Stephen G. Kurtz and James H. Hutson, eds., *Essays on the American Revolution* (New York: Norton, 1973), 32-81 and *The Quest for Power: The Lower Houses of Assembly in the Southern Royal Colonies, 1689-1776* (Chapel Hill: University of North Carolina Press, 1963). For the variances between the English colonies see Richard Beeman, *The Varieties of Political Experience in Eighteenth-Century America* (Philadelphia: University of Pennsylvania Press, 2004).

<sup>4</sup> For the constitutional arguments against Parliament's measures see John Phillip Reid, *A Constitutional History of the American Revolution* 4 vols., *The Authority to Tax*, vol. 2. (Madison: University of Wisconsin Press, 1986) and Edmund Morgan, *The Stamp Act Crisis: Prologue to Revolution* (Chapel Hill: University of North Carolina Press, 1953).

take care of it's interest, and provide for it's peace and internal government.”<sup>5</sup> Because of this distinction in colonial and parliamentary responsibilities, British attempts to tax the colonies internally were unconstitutional and an arbitrary seizure of power.

Yet, political thought on this topic in the years following Dickinson's essays moved to the point where, by 1774, many colonial opponents rejected even Parliament's ability to regulate commerce. These arguments, the leading thoughts on the subject when the First Continental Congress met in Philadelphia in 1774, maintained that the colonies were in essence completely sovereign, owing their allegiance only to the English crown and not Parliament.<sup>6</sup> The colonies, while not desiring war and still asserting themselves as English, certainly believed themselves to be sovereign, even while still a part of the empire.<sup>7</sup> Political scientist David Hendrickson, has recently noted “that [the First

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<sup>5</sup> Richard Bland, “The Colonel Dismounted: Or the Rector Vindicated. In a Letter Addressed to His Reverence: Containing a Dissertation on the Constitution of the Colony” (Williamsburg: John Royle, 1764), 1-57; Stephen Hopkins, “The Rights of the Colonies Examined” (Providence: William Goddard, 1765), 1-24, quote on 10 and Daniel Dulany, “Considerations on the Propriety of Imposing Taxes in the British Colonies, for the Purpose of Raising a Revenue, by Act of Parliament” (New York: John Holt, 1765), 34. John Dickinson, Letter IX of “Letters from a Farmer in Pennsylvania” in Forrest McDonald, ed., *Empire and Nation: Letters from a Farmer in Pennsylvania and Letters from a Federal Farmer* 2<sup>nd</sup> edition (Indianapolis: Liberty Fund, 1999), 51. Dickinson, more than the other writers cited here, argues in favor of “*imperium in imperio*,” which translates into “empires within empire.” Political philosophers believed this concept a near impossibility because of the divided sovereignty that it naturally embodied. See Bernard Bailyn, *The Ideological Origins of the American Revolution*, (Cambridge: Harvard University Press, 1967; reprint 1992), 223-229. For a strong argument that downplays the “internal” and “external” tax debates, see Morgan, *The Stamp Act Crisis*, *passim* but, especially, 75-91.

<sup>6</sup> The two best examples of this stark argument of imperial federalism are John Adams, “Novangulus” No. 3 in C. Bradley Thompson, ed. *The Revolutionary Writings of John Adams* (Indianapolis: Liberty Fund, 2000) and James Wilson, “Considerations on the Nature and Extent of the Legislative Authority of the British Parliament” (Philadelphia: William and Thomas Bradford, 1774), 1-35.

<sup>7</sup> One of the best examples of this is Joseph Galloway's plan of union. At the meeting of the first Continental Congress, Pennsylvania delegate Joseph Galloway submitted a plan for colonial union he hoped would calm the tension between Parliament and the Colonies. His proposal established an essentially American Parliament, with delegates selected by the colonial assemblies, which would be responsible for “regulating and administering all general police and affairs of the colonies.” Under Galloway's plan, the British Parliament could still enact “general regulations” but it would require the consent of the Colonial parliament. Congress voted the table the measure, which it never did. Congress later voted to expunge the plan from its record. See Joseph Galloway, “A Candid Examination of the Mutual Claims of the Great Britain and the Colonies: with a Plan of Accommodation on Constitutional Principles” (New York: James Rivington, 1775), 1-63; Rakove, *The Beginnings of National Politics*, 54-56; Robert Calhoon, “‘I have Deducted Your Rights;’ Joseph Galloway's Concept of His Role, 1774-1775, in

Continental Congress] constituted themselves in 1774 and 1775 as a ‘Congress’ rather than a Parliament was no coincidence. ‘Congress’ was a diplomatic term, signifying an assembly of states or nations.”<sup>8</sup> Thus, the meeting of the Continental Congress was understood by the attendees as a gathering of twelve sovereign states (Georgia did not attend). The intercontinental flavor of the Congress was even more explicit given that the colonies provided their delegates with instructions on how to vote on potential measures and developments.<sup>9</sup>

Early American historians and political scientists have generally accepted that a quasi-federal structure existed between England and the colonies; this consensus is furthered when discussing the formation of the Confederation and Union and attempting to answer which came first, the American Union or the individual states? This question, or rather the various answers to it, has persisted throughout the nation’s history, causing many of the political crises of the early republic. At the heart of this question is, where does most political authority lie, in a general (and since 1787), general government or primarily with the states? According to Richard Morris and Curtis Nettles, “the

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Robert Calhoun, ed., *The Loyalists Perception and Other Essays* (Columbia: University of South Carolina Press, 1989), 49-74.

<sup>8</sup> David C. Hendrickson, “The First Union: Nationalism versus Internationalism in the American Revolution” in Eliga H. Gould and Peter S. Onuf, eds., *Empire and Nation: The American Revolution in the Atlantic World* (Baltimore: The John Hopkins University Press, 2005), 38. Hendrickson’s essay is a summation of the first half of his work, *Peace Pact*.

<sup>9</sup> In his mammoth, multi-volume work, *A Defense of the Constitutions of the United States of America*, John Adams noted the international dimensions of the Congress. “Congress,” he wrote, “is not a legislative assembly, nor a representative assembly, but only a diplomatic assembly.” John Adams, *A Defense of the Constitutions of the United States of America*, in George W. Carey, ed., *The Political Writings of John Adams* (Washington, D.C.: Regnery, 2000), 215. In an interesting side note, Thomas Jefferson, who generally approved of Adams’ work, chided his friend over this passage. The Virginian diplomat remarked: “There is one opinion in it [*A Defense*], however, which I will ask you to reconsider, because it appears to me not entirely accurate, and not likely to do good. . . . Separating into parts the whole sovereignty of our states, some of these parts are yielded to congress. Upon these I though think them both legislative and executive, and that they could have been judiciary also, had not the confederation required them for certain purposes to appoint a judiciary. . . . I doubt whether they are at all a diplomatic assembly.” Thomas Jefferson to John Adams, February 23, 1787, in *ibid*.

conditions under which the Union and the States were born required, first, that the people of the colonies or States should act together in an effective union.”<sup>10</sup> To scholars who assert strong this strong nationalist interpretation of the Union – of which Morris and Nettles are the best representatives – the American union was forged in 1774 with the formation of the Continental Congress and the Articles of Association. Since the New Deal of the 1930s, this nationalist interpretation has reigned supreme and has been rarely challenged by most historians although in recent years some historians have attempted to re-examine the topic.<sup>11</sup>

The nationalist argument ultimately falls short, however. Historians advancing this argument either ignore or downplay several critical aspects that countermand their arguments including the lack of contact between colonies prior to 1765 and the representative nature of the First Continental Congress, which consisted of delegates

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<sup>10</sup> Richard B. Morris, *The Forging of the Union, 1781-1787* The New American Nation Series, eds. Henry S. Commager and Richard B. Morris (New York: Harper and Row, 1987), esp. 80-110; Morris, “The Forging of the Union Reconsidered: A Historical Refutation of State Sovereignty over Seabeds,” *Columbia Law Review* 74 (June 1974): 1056-1093. The quote is from Curtis P. Nettles, “The Origin of the Union and the States,” *Proceedings of the Massachusetts Historical Society* LXII, (1963): 68-83, quote on 82. Nettles is the most forceful advocate of this interpretation. For other “union first” arguments, see Samuel Beer, *To Make a Nation: The Rediscovery of American Federalism* (Cambridge: Harvard University Press, 1993); Max M. Edling, *A Revolution in Favor of Government: Origins of the U.S. Constitution and the Making of the American State* (New York: Oxford University Press, 2003); Jack Rakove, *Beginnings of National Politics*, while Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Knopf, 1997), 161-203, espically 163-168 is more nonchalant about the issue than his previous work. Gordon Wood, *Creation of the American Republic, 1776-1787* (Chapel Hill: University of North Carolina Press, 1969), 354-363, while more tepid in his argumentation on the Union than the above scholars, believes that “sovereignty was not as explosive and as wide ranging an issue in the formation of the Americans’ confederation” because since 1774 this union had “assumed institutional form.”

<sup>11</sup> Forrest McDonald, *States Rights and the Union: Imperium in Imperio, 1776-1861* (Lawrence: University Press of Kansas, 2000); Hendrickson, *Peace Pact*, For the importance of federalism see Hendrickson, *Peace Pact*; Peter Onuf, *Origins of the Federal Republic: Jurisdictional Controversies in the United States, 1776-1787* (Philadelphia: University of Pennsylvania Press, 1983); Onuf, *Jefferson’s Empire: The Language of American Nationhood* (Charlottesville: University Press of Virginia, 2000), 109-146; Onuf, *Statehood and Union: A History of the Northwest Ordinance* (Bloomington: Indiana University Press, 1987); Onuf and Cathy Matson, *A Union of Interest: Political and Economic Thought in Revolutionary America* (Lawrence: University Press of Kansas, 1990); Lance Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic* (Ithaca: Cornell University Press, 1995), 1-164; Jack P. Greene, “Colonial History and National History: Reflections on a Continuing Problem,” *William and Mary Quarterly* 64 (April 2007): 235-250.



selected by the various colonies to represent the individual colonies and not an amorphous “American people.” Finally, and perhaps most important, nationalist historians rarely take the idea of federalism into account. It is federalism, perhaps more than anything else, which demonstrates how the states predate the Union. For federalism to work, divisions of authority have to exist. What nationalist historians cannot – or have not – answered was how a national Union could come into being in 1774 without their first being subordinate sets of authority? In 1774, this sub-set was obviously the colonies; yet, when the colonies formally became independent states in 1776, the former colonies did not fundamentally change how they functioned, their geography, and with few minor exceptions their structure. Thus, the transition between colonies to state was, in many ways, more a change in semantics than an outright elemental re-ordering.

Thus, before the American Revolution the colonies were *de facto* sovereign states. The diplomatic nature of the Continental Congress made this notion a reality. When the colonial rebellion became the American Revolution in 1776, the idea of independent colonies becoming sovereign states was not a great intellectual leap for Americans to make; in fact, it was not a leap at all as that was the imperial reality before the Revolution. Even the Declaration of Independence embodied the sovereign nature of each state when Jefferson noted that “representatives of the United States of American, in general Congress assembled” were the ones declaring that “they ought to be, free and independent states” able to do all “things which independent states may of right to do.” Jefferson’s use of the plural “states” was not mere semantics, nor was it a slip of the pen; it was the acknowledgement of thirteen separate entities. A critical and often-overlooked aspect of the document was how Jefferson’s words also pinpointed the nature of the

Union by acknowledging Congress as a group of “representatives of the United States,” instead of a representation of an American people. Finally, the sovereign nature of the individual states was a vital aspect to the attempts made at forging a union during the Revolution. Article Two of the Articles of Confederation declared that “each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.”<sup>12</sup> The clause embodied the sentiments American’s had employed against the English during the imperial crisis.

While recognizing state sovereignty, the Articles of Confederation, nonetheless, empowered the Continental Congress with some authority. Although most historians believe that the Articles were defective because of a lack of power, especially the power of taxation, this really was not the case and ignores how the Union was one in which the states retained their sovereignty, leaving matters of taxation as an internal measure of the states. Yet, in keeping with the past experience and arguments of imperial federalism, the Articles authorized Congress to deal exclusively with matters of war and peace, matters that all Americans would describe as being external and to the mutual benefit of all the states.<sup>13</sup> Despite the fact that the states did not officially ratify the Articles until 1781, the Congress worked under its authority throughout the course of the war.

During the American Revolution, the Congress made numerous recommendations to the states. Varying in topic and scope, most of these recommendations had little to do

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<sup>12</sup> Article II of the Articles of Confederation.

<sup>13</sup> One of the most insightful works that explains the division of power between the States and the Articles is Jerrilyn Greene Marsten, *The King and Congress: The Transfer of Political Legitimacy, 1774-1776* (Princeton: Princeton University Press, 1987). Marsten posits that the authority Congress wielded resembled those powers of the British Monarchy, such as making war and conducting peace. While only incidentally mentioning federalism, this is exactly what Marsten is discussing. Her argument goes a long way, I think, in explaining why Congress did not have particular power such as taxation.

Loyalists, but several of several of Congress' suggestions dealt directly on how to handle wayward Americans. Among their suggestions regarding Loyalists were the confiscation of their property, the enactment of treason legislation, punishment of counterfeiters, and the disarming of suspected Loyalists, all of which contained the hint that they were bereft of virtue.<sup>14</sup> These suggestions were only recommendations to the states; they were non-binding and could be ignored by the states, if desired. One Congressional resolve, for example, "recommended to the different assemblies, conventions, committees or Council of Safety" that Tory machinations against the American cause be frustrated.<sup>15</sup> In some cases, the States had already passed some form of the legislation being suggested by the Congress, making most of those suggestions moot at the time of their issuance. Thus, the states determined whether to follow or ignore Congress' recommendations. Given the federalist system of the American union, this should not surprise historians, yet the standard interpretation of the Congress is one of embarrassing impotence that hindered prosecution of the war and other domestic issues. But this interpretation misses the nature of the American Union; Congress did not have the authority to enforce such measures because the states expected and demanded to take care of their own internal problems. While Loyalists caused trouble for each state and for the war in general, a national policy on Tories was not formulated because the Loyalists were an internal problem for each state, meaning that individual states dealt with their particular English supporters as they best saw fit. Individually handling the problem of Loyalists corresponded well with the states' colonial experience, the arguments against English

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<sup>14</sup> For these actions see *The Journals of the Continental Congress*, Worthington C. Ford, ed. 34 vols. (Washington, D.C.: Government Printing Press, 1904-1937), 4: 19-20, 205; 5: 475-476; 9: 971, 1044-1045 [hereafter cited, *Journals of the Continental Congress*].

<sup>15</sup> *Ibid.*, 5: 475-476.

internal taxation measures, and the understanding of state sovereignty under the Articles of Confederation.

### **Federalism and Negotiating the Treaty of Peace**

The background and development of American federalism and how it affected the treatment and handling of Loyalists during the Revolution is significant in understanding the post-war attempts at reintegrating former Tories. The system established during the colonial period and enshrined with American independence played a critical role in creating a peace with England and rehabilitating wayward Loyalists. This question of the Loyalists' treatment and federalism can be seen in an episode that transpired immediately after the war, when Sir Guy Carleton, the Commander-in-Chief of British troops in North America, wrote to his American counterpart, George Washington, requesting the Continental Congress suspend the individual states' treasons laws. The American General informed Carleton that he would not enter into negotiations on the matter, citing how the legislation was an internal issue that only the individual states could address. When Washington informed Congress of Carleton's request, a congressional committee that had James Madison as a member, applauded the American Commander's decision and resolved "that the states of America which compose the union, being sovereign and independent, the Laws respectively passed by them for their internal government and the punishment of their offending citizens, cannot be submitted to the discussion of a foreign power, much less of an enemy."<sup>16</sup> In part, this exchange demonstrated once again how the English never truly grasped the idea of federalism before the war; but more importantly, Congress' resolve was an important reminder of the structure of the

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<sup>16</sup> *Journals of the Continental Congress*, August 12, 1782, 23: 461; William T. Hutchinson, *et al.*, eds., *The Papers of James Madison* 13 vols. (Chicago: University of Chicago Press, 1961-1977), 5: 42-43 [hereafter cited, Madison, *Papers*].

American Union. Because once Americans and Congress received the definitive Treaty of Peace a year and a half later, this reminder of state sovereignty played a critical role in the Treaty's reception and implementation, as well as the subsequent rehabilitation of Loyalists.

While Congress educated Carleton on the nature of American federalism and its effects on Loyalist treatment, American negotiators met in Paris with British representatives to negotiate a peace settlement. Not surprisingly, Loyalists were one of the main topics of discussion. Before formal negotiations began, however, Robert Livingston, Congress' Secretary of Foreign Affairs, wrote to Franklin expressing Congress' concerns about accepting Loyalists back into the country. Livingston told Franklin that readmitting any Loyalist endangered the country and that it would be nearly impossible for Tories to recover any confiscated land. The Secretary provided Franklin with two reasons against Tory re-admittance. First, Loyalist reintegration would create "general dissatisfaction and tumult" by forcing those who suffered for the cause of liberty to watch as those who abandon America in its hour of need lose nothing for their desertion. Second, a Loyalists presence in the new country would "injure and subvert our constitution and government and to sow division among us" and "pave the way for the introduction of the old system." At no cost, Livingston warned Franklin, should the Treaty allow for Loyalist re-admittance.<sup>17</sup>

Livingston's caution on the importance of non-reintegration came in the midst of the states directing their Congressional delegates on what provisions to include in the

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<sup>17</sup> Robert Livingston to Benjamin Franklin, January 7, 1782, in Francis Wharton, ed., *The Revolutionary Diplomatic Correspondence* 6 vols. (Washington, D.C.: Government Printing Office, 1889), 5: 93; Ellen R. Cohn, et al, eds., *The Papers of Benjamin Franklin*, 38 vols. to date (New Haven; Yale University Press, 1959 - ), 34: 399-400 [hereafter cited Franklin, *Papers*].

official set of negotiating instructions.<sup>18</sup> A congressional committee, created to compose the official negotiating instructions to the American delegation, reported on many of the issues the States desired from the peace. Regarding the Loyalists, the Committee was particularly concerned with a state's confiscation of their property. The Committee recommended the delegates reject any attempt for Loyalists to recover their lost land, because "these confiscations having taken place, more or less, in almost all the states; and having undergone various transfers from individual to individual, a specifick restitution is absolutely impractical."<sup>19</sup> While the formal instructions were worded a little differently – but retaining the same argument of the complexity and impracticality – the message to the delegates was clear: because the confiscation of Loyalist property occurred on the state level, and handled by the individual states, it was too complex a matter and should not be issue at the peace negotiations.

Congress issued this particular set of formal instructions while the American diplomats were negotiating with England. Despite the timing of their issuance, the instructions did more than just take confiscated property off the negotiating table. It also clarified for the first time in post-war America, how American's understood Loyalists and their actions. According to Congress's instruction, three classes of Loyalists existed. The first were those Tories, such as Massachusetts Governor Thomas Hutchinson, who fled American shores before the Declaration of Independence. The second group consisted of Tories who abandoned the continent after the Declaration, and the third comprised Loyalists expelled by the states. This third group received the ire of Congress in their directions to the negotiators. "It must be readily seen," the Congress wrote to the

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<sup>18</sup> See, for example, the Act passed by Massachusetts October 27, 1781. This particular example focused on the fisheries off Newfoundland. *Journals of the Continental Congress*, 23: 471-472.

<sup>19</sup> *Ibid.*, 479.

mission, “how dishonourable and troublesome a stipulation [in the peace treaty] for their return would be to the governments they have deserted.”<sup>20</sup> Therefore, Congress forbade the American delegates to accept any plan to re-admit this group of Loyalists. Of greater importance was how the Congress, in their official instructions, remarked that the treason Loyalists committed was not against a national government, but, rather, against the individual state governments.<sup>21</sup> Even in attempting to formally end the war for independence, Congress recognized the sovereignty of each state. The instructions further demonstrated how the issue of Loyalist rehabilitation tied directly into the subject of state sovereignty. Because the nature of the American Union under the Articles permitted Congress the exclusive authority over issues of war and peace, through their instructions Congress seized and outlined what could have been a national policy regarding returning Loyalists by signifying which Tories could not be re-admitted. What happened instead, as will be shown, was that the Loyalist terms of the Treaty were not necessarily what the Congress intended and resulted in the abandonment of any real and potential authority it had for creating a national policy on Loyalist reintegration. To understand how this happened, it is necessary to examine the negotiations and the terms reached concerning the Loyalists.

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<sup>20</sup> *Journal of the Continental Congress*, 24: 520-521. Also notice the plural use of governments.

<sup>21</sup> This argument for the state sovereignty origins of treason goes against the standard work on subject, Bradley Chapin, *The American Law of Treason: Revolutionary and Early National Origins* (Spokane: University of Washington Press, 1964). Chapter six will examine treason laws and cases.

## **Negotiations Begin**

Official negotiations between American and British peacemakers began in September, 1782, in Paris. From April to late September of that year, informal talks occurred between Franklin and the British plenipotentiary, Richard Oswald.<sup>22</sup> Franklin, whose actual diplomatic skills historians have exaggerated, committed an egregious error, and a violation of his instructions, by discussing with his British counterpart compensation for Loyalists.<sup>23</sup> The famous American's plan for Loyalist reparations was rather simple but incredibly brazen: England should cede Canada to United States. The sale of Canadian lands, Franklin informed Oswald, would "raise a Sum sufficient to pay for the houses burnt by the British troops and their Indians; and also to indemnify the Royalists."<sup>24</sup> From the start, Franklin violated Livingston's orders forbidding the any discussion on Tory compensation. Making matters worse, Franklin allowed Oswald to copy his notes and forward them to the British Prime Minister, Lord Shelburne. To Franklin's credit, he realized his mistake at "having hinted" at Loyalist compensation.<sup>25</sup> Regrettable or not, Franklin's mistake followed the American delegates' for the rest of the negotiations and gave the British leverage in their push for Loyalist compensation.

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<sup>22</sup> For a description of Oswald and the other British peace delegates see Charles R. Ritcheson, "Britain's Peacemakers, 1782-1783: 'To an Astonishing Degree Unfit for the Task'?" in Ronald Hoffman and Peter J. Albert, eds., *Peace and the Peacemakers: The Treaty of 1783* (Charlottesville: The University Press of Virginia, 1986), 70-100. The following discussion on the Treaty negotiations does not detail nor discuss any of the other issues at the peace negotiations as they are generally irrelevant to the topic of the Loyalists. Only in those instances where the outside (to this chapter) topics relate to the Loyalists they are mentioned.

<sup>23</sup> For examples of this exaggeration see Gerald Stourzh, *Benjamin Franklin and American Foreign Policy* (Chicago: University of Chicago Press, 1954); Jonathan Dull, *Diplomatic History of the American Revolution* (New Haven: Yale University Press, 1985) and "Franklin the Diplomat: The French Mission," *Transactions of the American Philosophical Society* 72 (1982): 1-72, especially 53-64.

<sup>24</sup> Benjamin Franklin, "Journal of the Negotiations for Peace," April 19, 1782 in Albert Henry Smyth, ed., *The Writings of Benjamin Franklin*, 10 vols. (New York: The McMillan Company, 1907), 7: 472 [hereafter cited Franklin, *Writings*.]; Richard Morris, *The Peacemakers: The Great Powers and American Independence* (New York: Harper and Row, 1965), 261-263.

<sup>25</sup> Morris, *Peacemakers*, 263. Despite Franklin's regret, he conveniently failed to notify his fellow delegates of his mistake.



Franklin soon realized the ramifications of his April gaffe when, in June, Oswald delivered to the American a copy of the English delegations' instructions. Included in them was an order for Oswald to consider an "Establishment for the Loyalists" and to do everything possible to persuade the Americans to obtain a "fair Restoration or Compensation for whatever Confiscations have taken place."<sup>26</sup> Franklin recorded in his diplomatic journal that he informed England's negotiator that Congress possessed no authority to have confiscation laws repealed or to have any compensation given to Loyalist. Simply put, Franklin informed Oswald, the matter was "an affair pertaining to each state." If England sought compensation for the Loyalists, Franklin concluded, perhaps England should compensate Americans for the devastation and confiscation of their property during the war.<sup>27</sup>

Historians are correct to view Franklin's reliance on federalism as a stratagem designed to deflect any British attempt to obtain compensation for the Loyalists. It was an evasive maneuver, but it was also the truth. In no way could the American negotiators force a repealing of the Loyalist measures; not only did the American commissioners lack the authority to discuss the issue, but for Congress to meet English demands for the Loyalists would violate the federal nature of the American Union. Oswald appeared to have understood this when he reported, with a tiresome tone, to his superiors that the United States would not compensate Loyalists, "having from the beginning" being "assured [the American negotiators] could talk no part in the Business, as it was exclusively retained under the jurisdiction of the respective States."<sup>28</sup> Despite Oswald's

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<sup>26</sup> Franklin, "Journal of Negotiations," June 5, 1782, in Franklin, *Writings*, 8: 526.

<sup>27</sup> *Ibid.*, 526-527.

<sup>28</sup> *Ibid.*, 527; Quote from Richard B. Morris, ed. *John Jay: The Winning of the Peace: Unpublished Papers, 1780-1784* 2vols. (New York: Harper and Row, 1980), 2: 302 [hereafter cited, Jay, *Winning of the Peace*].

warning, the Shelburne ministry instructed its negotiators to obtain a general amnesty, a restitution of Tory property, and the securing of repayment of all British debts contracted before the war.<sup>29</sup> Had Franklin not committed his *faux pas* during his initial visit, it is conceivable that the British would not have pushed for amnesty and compensation from the Americans. England's stubbornness in seeking these terms and Franklin's rejection of overtures slowed the peace negotiations for several months. Protracting the pace of the talks even more, John Jay, another American diplomat, was too ill to travel to France from Spain, while John Adams, the third assigned American negotiator, remained in the Netherlands to secure a much needed loan for the Continental Congress.

When Jay arrived in Paris in late September, around the time Oswald received his instructions regarding the Loyalists, the negotiations began in earnest. Oswald reported to his superiors that when he broached the idea of a pardon for all Loyalists, Jay replied with the same argument Franklin employed. "The States," Jay reported, "being Sovereigns and the Parties at fault [i.e. Loyalists] answerable only to them," Congress could not "meddle in it." Jay also suggested that some Loyalists should depart America with the British troops on account that the state governments could (or would) not protect them.<sup>30</sup> The New York jurist maintained the belief that the Congress could not "meddle" in the how the states treated Tories, and demonstrated this belief when, on October fifth, he presented England's envoy with a preliminary draft of a treaty. This preliminary treaty was more interesting in what it did not include as opposed to its actual contents.

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<sup>29</sup> Franklin, *Papers*, 38: 264-265; Roberta Tansman Jacobs, "The Treaty and the Tories: The Ideological Reaction to the Return of the Loyalists, 1783-1787" (Ph.D dissertation, Cornell University, 1974), 32.

<sup>30</sup> Richard Oswald to Thomas Townshend, October 2, 1782 in Jay, *Winning the Peace*, 372-37.

Keeping with the Congressional instructions, no where in the preliminary treaty did Jay broach the subject of Loyalist amnesty, confiscation, or debt repayment.<sup>31</sup>

Oswald's instructions ordered him to push for terms of the Loyalists, and even though the preliminary treaty did not mention the subject, he nonetheless submitted Jay's draft to his superiors, recommending the approval of the document.<sup>32</sup> The Shelburne administration, however, had little regard for Jay's work and rejected the treaty, and issued new instructions to Oswald, which included reminders to push for Tory compensation in the form of the unsettled western territories and a clause for the "discharge of debts." Demonstrating disappointment in Oswald's lack of firmness with the Americans, the Shelburne administration dispatched Benjamin Strachey to provide a more solid backbone to the English side of the negotiations. Rather firm and unbending in personality, Strachey's mission included an attempt to achieve what Oswald failed to do, namely securing something for the Loyalists and their debts. The issue of the debts "require the most serious attention" Shelburne instructed Strachey. What the Prime Minister wanted from the Americans was for "honest debts . . . honestly paid in honest money."<sup>33</sup>

Strachey's arrival and Oswald's new instructions, as well as the arrival of Adams from the Netherlands, started another round of negotiations. From October 30 to November 4, the British and American diplomats discussed various issues that did nothing but stall and divide the discussions. The important issues regarding the Loyalists remained compensation and indemnification and their debts. As all previous times, the

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<sup>31</sup> Jay, "Preliminary Articles: First Draft Treaty," October 5, 1782, in *ibid.*, 389-392.

<sup>32</sup> Oswald to Thomas Townshend, October 8, 1782, in *Ibid.*, 388.

<sup>33</sup> *Ibid.*, 395-396.

American's response to the British overtures about the Tories and the repayment of debts was their lack of authority to discuss the topic and of Congress's power to force the issue. But on November 3, Adams, participating in his first round of talks, broke with Franklin and Jay. Not wanting Loyalists to ally themselves with other British creditors and to quell the later group's "Clamours" against the peace, Adams informed the British peacemakers that he "had no Notion of cheating any Body." He proposed for the Treaty to empower the Congress to recommend to the states the opening of their courts to settle "just debts." Although the British commissioners liked the proposal, the other American delegates had to be convinced to accept the idea, which they eventually did. Of critical importance, however, was Adams' separation of the issue of Loyalists and debt recovery. While a goodly number of Loyalists were either creditors or debtors (or both, as were most Americans), Adams told the British negotiators that the issues are separate. "The Question of paying debts, and that of compensating Tories," he said, "were two."<sup>34</sup>

Richard Morris, whose study of the peace negotiations remains the standard work on the subject, remarks that Adams' pronouncement and attempt at compromise put the issue of debt recovery on a "high moral ground."<sup>35</sup> While Morris explains Adams' personal motivations, he fails to note the political and constitutional importance of Adams' words. All Adams suggested to his fellow American delegates, and what they in turn proposed to the English diplomats, was for the Continental Congress to, as Adams put it, "recommend it to the States to open up their Courts of Justice for the Recovery of all just Debts."<sup>36</sup> The key word in Adams' proposal was *recommend*; as one of the most

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<sup>34</sup> L. H. Butterfield, ed., *The Adams Papers: Diary and Autobiography* 4, vols. (Cambridge: Harvard University Press, 1961), 3: 39-44, quote on 43-44 [hereafter cited Adams, *Diary and Autobiography*].

<sup>35</sup> Morris, *Peacemakers*, 361.

<sup>36</sup> Adams, *Diary and Autobiography*, 3: 44.

active members of the Continental Congress before being sent on his diplomatic missions in 1779, Adams knew perfectly well the purposeful lack of authority Congress had over the internal affairs of the states. Not only did Adams know of Congress' lack of authority, but he also understood from experience that the most Congress could do regarding the internal dealings of the states was to make recommendations. Therefore, while Adams may have had a personal repugnance for not paying personal debts, when placed within the context of the federalism of the American system, his proposal was not as breathtaking as it first appeared. The federalist nature of Adams' proposal may help explain why Jay and Franklin departed rather easily from their previous hard-line stance as well as from their instructions.

With the question of debts apparently settled, Jay penned a second preliminary treaty. Britain's continual push on the Americans for some sort of assistance by the Loyalists was modestly recognized. The second draft treaty allowed British merchants and Loyalists "or Refugees" the right to leave American shores with their goods six months after the final evacuation of British troops. Furthermore the draft treaty allowed the States to grant amnesty to those Loyalists previously "unaffected" by anti-Loyalist legislation. Finally, the second preliminary treaty permitted the repayment of all debts contracted before 1775 and permitted Congress to recommend to the states a revision of confiscation legislation.<sup>37</sup>

Oswald and Strachey accepted the terms of debt recovery and for Congress' pledge to recommend a revision of confiscation laws, but both negotiators still desired

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<sup>37</sup> Jay, *Winning the Peace*, 402-403.

something of value for the Loyalists.<sup>38</sup> Hoping to change the American's minds and achieve compensation or amnesty or both for the Loyalists, as well as demonstrating to the Loyalists that England had attempted to assist them, both English diplomats wrote their American counterparts begging for a reconsideration of the American position.<sup>39</sup> The American commissioner's response echoed their stance on the Loyalists since the initial days of the peace talks: there would be no article in the Treaty forcing a restitution of confiscated property. Making their case as plain as possible, the three Americans stated that compensation would be impossible because Tory property was "confiscated by Laws of particular States, and in many instances have passed by legal titles, thro' several Hands." They reiterated, one more time, that confiscation was "a Matter evidently appertaining to the internal Polity of the separate States, the Congress by the Nature of our Constitution, have no authority to interfere with it." The only method for the Americans to reconsider indemnification was for England to consider compensation American losses during the war, a position Franklin proposed in one of his initial conversations with Oswald. The American delegation was more forceful regarding any further attempts at Loyalist amnesty. "We have" they wrote, "already agreed to an amnesty more extensive than justice required, and full as extensive as Humanity could demand, we can therefore only repeat that it cannot be extended further."<sup>40</sup> In essence,

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<sup>38</sup> *Ibid.*, 397. Oswald informed Lord Shelburne that in the second preliminary treaty "some material points are gained" for the Loyalists but came "far short of what was wanted." Oswald to Shelburne, November 5, 1782, in *ibid.*, 397. Strachey, however, was pleased with the Loyalist provisions believing them to be a diplomatic victory for the British. He reported to his superiors that a Congressional recommendation was comparable to a royal message delivered Parliament. Clearly, Strachey was yet another Englishman who had not understood the nature of the American union. Tansman, "Treaty and the Tories," 48.

<sup>39</sup> Oswald to The American Commissioners, November 4, 1782; Henry Strachey to The American Commissioners, November 5, 1782, in *ibid.*, 399-400, 405-406; Franklin, *Papers*, 38: 276-278, 278-279.

<sup>40</sup> The American Commissioners to Oswald and Strachey, November 7, 1782, in Jay, *Winning the Peace*, 410-411; Franklin, *Papers*, 38: 285.

what Jay, Adams, and Franklin were telling the English negotiators was that the provisions in the preliminary treaty were as good as they were going to get.

If the American's believed their remarks would end England's advocacy for Loyalist compensation or amnesty, they were wrong. In fact, to relieve the pressure over the Loyalist issue while Strachey delivered the preliminary treaty to the Shelburne cabinet, Jay explained to Oswald why the Americans resisted compensation. But Jay was doing more than just defending the American position; he was also detailing the importance of the treaty to any potential return of Loyalists. Sounding much like the Congressional instructions of August which distinguished between Loyalists, the New York emissary distinguished two types of Tories. One group would never receive American forgiveness due to their actions during the war. Jay bluntly told Oswald that Americans would never "suffer them to live in their [the American's], even although we had lands to set them down upon, nor would those Persons be sure of their Lives there." Luckily for Americans and the peace negotiations this group of Tories "[was] not of any great Number." Yet Jay's discussion of the second group, the "less obnoxious" Tories, truly demonstrated how he believed the treaty would affect Loyalist rehabilitation. "[T]he Clause of Amnesty," opined the former President of the Continental Congress,

in the Plan of the New Treaty [i.e. the preliminary Articles of November 5], would make all such of them as were not under Judgement, or Prosecution, perfectly easy in their several Stations; and he made no doubt but, [Oswald informed Townshend] after a Peace the several States would treat them with as much lenity as their Case would admit of. And the bulk of these being besides of low rank, they would successively fall into the Sundry Occupations of the Country, and so Government would be saved the Expense of transporting and subsisting them.<sup>41</sup>

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<sup>41</sup> Oswald to Townshend, November 6-7, 1782, in Jay, *Winning the Peace*, 406-407. Adams also entertained a conversation with Oswald over the Loyalists while awaiting word from London. See Adams, *Diary and Autobiography*, 3:59-60.

In other words, Jay believed the granting amnesty to those Loyalists whom the states had failed to punish rendered reintegration not only possible but likely. As he noted, most of the King's Friends in this group were not political leaders or other people of serious consequence, thus making their re-entry into society easier. But before this easy assimilation could happen, the treaty had to first be agreed to by both sides. Jay also subtly nodded towards the federalist structure of country and its relationship with the treaty. While those "low rank" Loyalists would have an easier transition back into the polity because of the amnesty clause, the decision on how exactly to treat them still fell squarely with the states.

Jay's hope for an end to the peace talks ended when the Shelburne ministry rejected the second draft preliminary treaty, partly because of the treaty's lack of Loyalist compensation.<sup>42</sup> Because the Ministry insisted upon some indemnification for their American adherents and several unrelated issues, formal discussion restarted between England and America on November 25. The British delegation presented the Americans with their own version of the peace treaty. Article five of the English version included a provision for the restitution of "all estates, rights and properties" of confiscated Loyalists property. Strachey warned the American delegates that the Shelburne administration insisted upon the point and should such a provision not be included in a final treaty, all of Parliament would call for Tory restitution, thereby throwing the entire peace process into chaos. Attempting to show some good faith, Strachey suggested that if Americans considered some Loyalists too repugnant to be allowed restitution, their names should be

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<sup>42</sup> Adams, *Diary and Autobiography*, 3:69.



included in the treaty. This discussion of indemnification, or the “grand point” as Strachey called it, nearly caused the disintegration of the peace talks.<sup>43</sup>

The American response to Britain’s demand came the next day in a letter written by Franklin, which strongly rebuked England’s demands and even caused Adams to consider Franklin “very staunch against the Tories, more decided a great deal on this point than Mr. Jay or myself.”<sup>44</sup> Reminding the British delegation yet again of Congress’ inability to force the states to restore confiscated property, Franklin proceeded to read aloud the various state measures calling for an estimate of damage to private property incurred by British military activity. Among his many examples of British “enormities,” Franklin reported on the burning in Falmouth (modern-day Maine) “just before winter when the sick, the aged, the women, and children were driven to seek shelter where they could hardly find it.” Part propaganda and part diplomatic strategy, Franklin’s letter concluded by stating that if the British insisted upon Loyalist compensation, the Americans would demand reimbursement for English destruction of American property. If the monetary amount of the two figures came out to favor the Americans, Parliament would pay the restitution; or if the figure favored the Loyalists – which Franklin knew it would not – then the states would pay the costs.<sup>45</sup> Franklin’s message was clear: the Americans would not permit Loyalist restitution in the treaty.

The effect of Franklin’s letter was immediate, as Strachey and Oswald dropped the demand of complete restitution and asked that Loyalists only be given the chance to purchase their lost property at fair market value. In part, the British negotiators feared the end of peace talks if they pushed the Loyalist issue any further. To secure some

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<sup>43</sup> Strachey to the American Commissioners, November 25, 1782, in Jay, *Winning the Peace*, 429.

<sup>44</sup> Adams, *Diary and Autobiography*, 3: 77.

<sup>45</sup> Franklin to Oswald, November 26, 1782, in Franklin, *Papers*, 38: 311.

assistance for the Tories, the English peacemakers made major concessions to the Americans on the issue of the new nation's border, its right to navigate the Mississippi River, and to fish off the coast of Nova Scotia. Because of the English concessions, the British and American negotiators compromised on the Loyalist issue. The Americans agreed for Congress to "earnestly recommend" to the States a revision of their confiscation laws, the restitution of Tory estates for both "real British subjects" and those exiled throughout the British Empire, and who did not bear arms against the United States. Also, the Americans consented to allow Loyalists or "any other person" to have a year to travel within the United States "unmolested" in order to try to obtain restitution. Finally, the Americans agreed on a provision that prohibited future confiscations.<sup>46</sup>

The negotiations and concessions by both sides broke the potential deadlock over the several issues, including the Loyalists. On the last day of November, the American and English agreed to and signed a Preliminary Treaty of Peace. Containing nine articles the Preliminary treaty, which, with the addition of a tenth article became the Definitive Treaty on September third, 1783, articles four, five, and six dealt exclusively with Loyalist issues. Figure 2.1 notes those articles:

Figure 2.1

Article 4:

It is agreed that creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money of all bona fide debts heretofore contracted.

Article 5:

It is agreed that Congress shall earnestly recommend it to the legislatures of the respective states to provide for the restitution of all estates, rights, and properties, which have been confiscated belonging to real British subjects; and also of the estates, rights, and properties of persons resident in districts in the possession on his Majesty's arms and who have not borne arms against the said United States.

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<sup>46</sup> Morris, *Peacemakers*, 379-380.

And that persons of any other description shall have free liberty to go to any part or parts of any of the thirteen United States and therein to remain twelve months unmolested in their endeavors to obtain the restitution of such of their estates, rights, and properties as may have been confiscated; and that Congress shall also earnestly recommend to the several states a reconsideration and revision of all acts or laws regarding the premises, so as to render the said laws or acts perfectly consistent not only with justice and equity but with that spirit of conciliation which on the return of the blessings of peace should universally prevail. And that Congress shall also earnestly recommend to the several states that the estates, rights, and properties, of such last mentioned persons shall be restored to them, they refunding to any persons who may be now in possession the bona fide price (where any has been given) which such persons may have paid on purchasing any of the said lands, rights, or properties since the confiscation.

And it is agreed that all persons who have any interest in confiscated lands, either by debts, marriage settlements, or otherwise, shall meet with no lawful impediment in the prosecution of their just rights.

#### Article 6:

That there shall be no future confiscations made nor any prosecutions commenced against any person or persons for, or by reason of, the part which he or they may have taken in the present war, and that no person shall on that account suffer any future loss or damage, either in his person, liberty, or property; and that those who may be in confinement on such charges at the time of the ratification of the treaty in America shall be immediately set at liberty, and the prosecutions so commenced be discontinued.

While negotiations for ending the Revolutionary War continued, the one group perhaps most anxious to know the terms of peace than any other was the Loyalists. While boundaries could be disputed and settled, trade agreements discussed and negotiated, and American independence a forgone conclusion, it was the Loyalist who had the most to lose or gain depending on the outcome of the Treaty. The importance of the Treaty to the reintegration of the Loyalists is demonstrated in that the particulars of the peace accord determined whether Tories should stay abroad and away from their homeland or return in the hopes of resettling and possibly recovering confiscated property or existing debts, or, if they had remained in country, to flee and make a new life

somewhere else. Although they waited for any news from Paris, those Tories living in London, as well as those in the garrison towns in America, did not sit idly by just hoping for the best. Rather, Loyalists, either individually or in groups petitioned Parliament or military leaders on the distresses of the Loyalists in the hopes of influencing favorable terms for them in the treaty. In fact, most Loyalists feared being forgotten or poorly cared for by the Empire and the Treaty. “You cannot conceive,” Benjamin Thompson wrote to Lord Germain, “the distress that all ranks of [Loyalists] have been thrown into by the intelligence of the independence of America being acknowledged by Great Britain, and the loyalists being given up to the mercy of their enemies.”<sup>47</sup>

For all their anxiousness and worry over the terms of the Treaty, however, Loyalists never suspected that their fate hinged not just on the terms of the peace but also on the federalism that constructed the American Union. Yet, federalism served as the foundation in the creation of the American Union. While the concept can be found in the imperial history of colonial America, it became a cornerstone of independence. The Confederation borne from the Revolution ensured that the individual states retained most of their sovereignty, meaning they were, in essence, thirteen separate nations. The one aspect of sovereignty states surrendered to the Confederation was the ability to conduct war and conclude treaties. The nature of the Union and the peace-making authority of the Confederation were of particular importance when it came to the Loyalists. During the

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<sup>47</sup> Lt. Colonel Benjamin Thompson to Viscount Sackville, August 6, 1782, in Historical Manuscript Collections, *Report on the Manuscripts of Mrs. Stopford-Sackville of Drayton House, Northamptonshire* 2 vols. (London: Hereford Times, 1904-1910), 2: 252-253; George Atkinson Ward, ed., *Journal and Letters of the Late Samuel Curwen*, (Boston: J. H. Francis, 1842), 363 and Curwen to Andrew Dalglish, October 7, 1782, in *ibid.*, 353-354. Surprisingly enough, there is very little work down on the Loyalists’ expectations on the Treaty of Peace. For good starts, see Wallace Brown, *The Good-Americans: The Loyalists in the American Revolution* (New York: William Marrow and Company, 1969), 172; and Mary Beth Norton, *The British-Americans: The Loyalist Exiles in England, 1774-1789* (Boston: Little, Brown, Co., 1974), 172-172.

War, the Confederation Congress recommended to the states several methods in dealing with Tories; yet the handling of Loyalists was a state issue, in part because, the Confederation lacked the authority to do anything about it. The main reason, however, was that Loyalist were essentially a local problem for the individual states to deal with. When negotiating the Treaty of Paris in 1783, the idea of sovereign states dealing on their own accord with Loyalists played an important role in proceedings. Instructed to resist any national attempt at providing amnesty or indemnification for the Loyalists because it fell out of the purview of the Congress, the American negotiators, at first, resisted British efforts to include these measures. In order to secure favorable terms, however, the American peace-brokers abandoned their instructions and agreed to provisions that provided some protection for Loyalists. The next chapter examines the debates in the states over accepting the Treaty and the responsibility for enforcing its provisions and allowing the return of the Loyalists.

## Chapter 4

### Nationalists v. State Sovereignists: Debating the Treaty of Paris, 1783-1790

Shock and dismay filled the Loyalist ranks when official news of the Provisional Treaty reached both London and America. Having been secured in their belief that the subjugation of the rebelling colonies was simply a matter of time, news that the War was officially over and American independence granted crushed those hopes and made Loyalists contemplate the stark reality of their future. Especially upsetting for the Loyalists were the terms of the Treaty that dealt specifically with them. After General Cornwallis' surrender at Yorktown, American Tories received promises from the English government that their needs would be met. Now, however, the Treaty's terms made them feel betrayed and left them at the mercy of the American states. After reading the Provisional Treaty, exiled Loyalist Samuel Curwen confessed in his diary that the terms "astonish me." Other Tories living in London organized to remonstrate against the Treaty, hoping their actions would convince the Shelburne administration to reconsider the terms.<sup>1</sup> In New York City, where Loyalist refugees gathered under the protection of British military, the reaction to the Treaty was like that of their exiled brethren. One disgruntled Tory published a poem on the disgraceful terms of the Treaty, noting that "'Tis an honor to serve the bravest of nations, /And be left to be hanged in their capitulations." Another bitterly observed that while murders and thieves were "faithful to their fellows and never betray each other," England betrayed and abandoned their loyal

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<sup>1</sup> General Henry Clinton to American Refugees in *Royal Gazette*, March 9, 1782; George Atkinson Ward, ed. *Journal and Letters of the Late Samuel Curwen* (Boston: J. H. Francis, 1842), 364 [hereafter, Curwen, *Journal and Letters*]. *The Gentleman's Magazine and Historical Chronicle* 53 (1783): 174; Samuel Curwen to Isaac Smith, February 11, 1783, in Curwen, *Journal and Letters*, 365. For a list of the promises for protection and compensation Great Britain made to the Loyalists, see "Collections with Regard to the Case of the American Loyalists," (London: n.p. 1783), 1-7.

American subjects.<sup>2</sup> Even the Shelburne administration realized the shock the Treaty gave the Loyalists when the Prime minister defended the peace in Parliament, citing the need to preserve the whole empire even at the cost of losing a part of it. England's realization that the Treaty may not provide their American supporters with the proper terms was further demonstrated when, in early 1783, they created an investigative board to examine all Loyalist claims for compensation.<sup>3</sup>

The Treaty made one thing abundantly clear to Loyalists: it was a time "in which THOUSANDS of people are agitated to go or to stay."<sup>4</sup> While literally thousands of Loyalists left American shores to settle in the various parts of the Empire, others decided to remain in America, and many who had fled the continent during the war returned to their homeland.<sup>5</sup> Samuel Curwen asked a fellow Loyalist, "what think you of returning to your late abode, Salem?" Jacob Duché, an Anglican minister, wanted nothing more

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<sup>2</sup> Found in George Washington Greene, *Historical View of the American Revolution* 6<sup>th</sup> ed. (Boston: Houghton, Mifflin, and Company, 1895), 431; Elizabeth Johnston, *Recollections of a Georgia Loyalist*, Arthur Eaton, ed., (New York: the Bankside Press, 1901), 211.

<sup>3</sup> The official name was Loyalist Claims Commission. Few historians have made a direct connection between the Treaty's terms and the establishment of the Loyalist Claims Commission. Yet the link seems obvious enough had the Treaty truly provided for their compensation or indemnification, why bother investigating claims?

<sup>4</sup> Henry Van Schaack to Theodore Sedgwick, April 10, 1783 in Henry C. Van Schaack, ed., *Memoirs of the Life of Henry Van Schaack* (Chicago: A. C. McClurg and Company, 1892), 94.

<sup>5</sup> The actual number of Loyalist who left will probably never be known, although it is clearly in the tens of thousands. Most historians believe it was between 60,000 and 100,000. I believe the number is closer to the former. There are several good works on the Loyalist diaspora. Neil MacKinnon, *This Unfriendly Soil: The Loyalist Experience in Nova Scotia, 1783-1791* (Montreal: McGill-Queens University Press, 1986); Ann Gorman Condon, *The Envy of the American States: The Loyalist Dream for New Brunswick* (Fredericton, NB: New Ireland Press, 1984); Janice Potter, *While the Women Only Wept: Loyalist Refugee Women* (Toronto: McGill-Queens University Press, 1993); William S. Wallace, *The United Empire Loyalists: A Chronicle of the Great Migration* (n.p., n.p.; reprint, Boston: The Gregg Press, 1972); J. Barton Starr, *Tories, Dons, and Rebels: The American Revolution in British West Florida* (Gainesville: University of Florida Press, 1976); Keith Mason, "The American Loyalist Diaspora and the Reconfiguration of the British Atlantic World" in Jack Greene and Eliga Gould, eds, *Empire and Nation: The American Revolution in the Atlantic World* (Baltimore: The Johns Hopkins University Press, 2005), 239-260 and Alan Taylor, "The Late Loyalists: Northern Reflections of the Early American Republic" *Journal of the Early Republic* 27 (Spring, 2007): 1-35. For some primary sources on the Loyalist flight, see Catherine Crary, *The Price of Loyalty: Tory Writings from the Revolutionary Era* (New York: McGraw-Hill, 1973), 387-452.

than to return to Philadelphia, his “native city.” So strong was Duché’s desire that he claimed he would willingly forfeit his £300 annual salary.<sup>6</sup> While exiled in London, Peter Van Schaack, who was one of the few Loyalists unfazed by the Treaty, informed his close friend, John Jay, that he considered himself “a citizen of the United States, *de jure* at least, whether I become so *de facto* or not.”<sup>7</sup> The Loyalist dilemma of staying, fleeing, or returning was aptly captured in the anonymously authored poem, “The Tory’s Soliloquy.” Barrowing from Shakespeare’s *Hamlet*, in which the title character gives his famous “to be or not to be” soliloquy, the Tory poet asks with great emotion “To go – or not to go – is that the question?” The poet continued by weighing the options of staying in his homeland or fleeing to the “bleak Roseway’s shores” of unfamiliar lands. In the end the poet suggests to undecided Tories to leave America, “Where British arms and Tory arts have failed” because starting anew meant not having Whig “sword or law to persecute us there.”<sup>8</sup>

Yet, if the Treaty served as the “magna charta of the poor loyalist,” as one Tory called it, the outrage that greeted the Treaty only worsened when Loyalists contemplated recovering their debts or confiscated property. Practically all Loyalists believed they had little chance of recovering lost debts or confiscated property. The main hurdle in their

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<sup>6</sup> Samuel Curwen to Andrew Daglish, March 17, 1783, and Curwen to James Russell, October 8, 1783, in Curwen, *Letters and Journal*, 373, 390; Jacob Duche, Jr., to Benjamin Franklin, January 28, 1783, and April 22, 1783, in *The Papers of Benjamin Franklin*, 38 vols. to date (New Haven: Yale University Press, 1959 - ), 38: 674, 39: 371. George Washington to Jacob Duche, August 10, 1783, in Theodore J. Crackel, ed. *The Papers of George Washington Digital Edition, Presidential Series* (Charlottesville: University of Virginia, 2007), 3: 394-396; George Fitzpatrick, ed. *The Writings of Washington from the Original Manuscript Collections, 1745-1799* 39 vols. (Washington D. C.: Government Printing Office, 1931-1944), 27: 91; Merrill Jensen, *The New Nation: A History of the United States during the Confederation, 1781-1789* (New York: Vintage, 1950), 266. Duche did return in 1792, but only after trying to secure permission from several Americans.

<sup>7</sup> Peter Van Schaack to John Jay, August 5, 1783, in Henry C. Van Schaack, ed., *The Life of Peter Van Schaack, LL.D.* (New York: D. Appleton and Co., 1842), 309 [hereafter, Peter Van Schaack, *Life of Van Schaack*]. Also see Van Schaack’s March 4, 1783, letter to his brother, Henry in *ibid.*, 331-334.

<sup>8</sup> “The Tory Soliloquy,” in Cary, ed. *The Price of Loyalty*, 391-392.



path, they believed, was the recommendatory aspect of Article Five of the Treaty. Loyalists realized better than any English politician the federalist nature of the American confederation and the unlikelihood of the States complying with any recommendation. Elizabeth Johnston informed her husband that, according to the Treaty, “no other provision has been made than just recommending . . . clemency” to the States. Exiled Loyalist John Watts wrote that he had hoped the Treaty would help those Americans who supported England. “Far from it,” he wrote; rather “we who were proscribed and our estates confiscated remain just as we did, with only this difference, to be mercifully recommended by Congress to the several States, to be treated as seemeth good in their own eyes, a comfortable Situation, to be sure.”<sup>9</sup> Joseph Galloway distilled the problem of the recommendation clause better than any other Loyalist. In a rushed pamphlet published shortly after the Provisional articles became public, the Pennsylvania Tory contended that England should not rely on the American states to restore debts or properties. It was unreasonable for any Loyalist or MP to think the States would be “so benevolently disposed” towards those who “have been uniformly its enemies.” Focusing on the central reason for why the states could not be depended upon to indemnify Loyalists, Galloway lamented that “as the sovereign authority of the States has been indefinitely and unconditionally ratified” by the Treaty, the states had no moral or political obligation to restore property or debts, nor should there be any expectation of

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<sup>9</sup> Peter Van Schaack, *Life of Van Shaack*, 324, 326; Johnston, Elizabeth Johnston, *Recollections of a Georgia Loyalist*, 211; John Watts quote from Norton, *The British-Americans*, 182.

them doing so. Accordingly, he begged Parliament to protect and provide for the Loyalists.<sup>10</sup>

Galloway's remarks on the sovereign nature of the States not only summarized his argument to Parliament, but also provide a glimpse into the American debate on the treaty. Once the American and British negotiators agreed to the Provisional Articles in November, 1782, the next step in the peace process was for the Confederation to ratify or reject the document. As the contents of this chapter will reveal, the course of ratification would be far more difficult than realizing the particulars of the Anglo-American peace treaty. When the Provisional Articles of the Treaty reached American shores in early 1783, a rancorous debate ensued over whether the States should consent to its provisions. The crux of the dispute was over the timing of the implementation of Articles Four through Six of the Treaty (which allowed for debt recovery, potential property restoration, and Loyalist clemency, respectively) and the locus of the responsibility – in the states or the Confederation Congress – for the Treaty's enforcement. The federalist nature of the Union made this question of responsibility even more contentious: did the Confederation possess the authority to enforce the Treaty because of its capacity to conduct peace? Or did enforcement fall to the States because of their sovereign nature?

The answer to this question, moreover, also would solve the quandary of whether the states or Congress should be responsible for Loyalist reintegration. Ultimately, this debate brought forth two rival camps, each vying for its interpretation of the Treaty to prevail. Historians studying the immediate post-war years have demonstrated how a small group of Congressional members, known as the "Nationalists," believed in the need

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<sup>10</sup> Joseph Galloway, "Observations on the Fifth Article of the Treaty with America: And on the Necessity of Appointing a Judicial Enquiry into the Merits and Losses of the American Loyalists" (London: n.p., 1783), quote on 7.

to amend and strengthen the Articles of Confederation. While the membership of this group can be debated, its existence cannot.<sup>11</sup> These Nationalists argued for an immediate implantation of the Treaty with liability for its enforcement falling primarily to Congress. The second group, which could be termed “State Sovereignists,” lambasted the Treaty’s Loyalist provisions, insisting that they violated the sovereignty of the individual states, and the separate states’ ability to decide how to assimilate former Tories.<sup>12</sup>

### **American Reaction to the Treaty in Congress, 1783**

The initial debate over the Loyalist articles of the Paris Treaty occurred among the American peace delegates themselves. Although they would later admonish the states for their resistance to complying with the Treaty’s terms, the American negotiators had fretted over whether these three articles provided too much in favor of the Loyalists. Writing to Secretary Livingston, Franklin and Adams confessed that “we may [have] yielded too much in favor of the royalists” and they hoped that what “[was] done for the refugees would be pardoned” when compared with the other favorable terms the American received.<sup>13</sup> In their official report to Livingston, the American diplomats defended and explained their reasoning behind the Tory articles of the treaty. The Commissioner’s defense and explanation are interesting, because earlier during the negotiations they acknowledged and wielded with great efficacy the state sovereignty

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<sup>11</sup> For the Nationalists see Richard B. Morris, *Forging of the Union, 1781-1789, The New American Nation Series*, eds. Henry Steele Commager and Richard B. Morris (New York: Harper and Row, 1987); Irving Brant, *James Madison*, 6 vols., *James Madison: The Nationalists, 1781-1787*, vol. 2 (Indianapolis: Bobbs-Merill, 1941-1961); E. James Ferguson, “The Nationalists of 1781-1783 and the Economic Interpretation of the Constitution” *Journal of American History* 56 (Sept. 1969): 241-261; and Merrill Jensen, *The New Nation: A History of the United States during the Confederation, 1781-1789* (New York: Vintage, 1950).

<sup>12</sup> No label exists that properly describes this group in the sense that historians have created the moniker of “nationalists” to portray those who supported a stronger confederation. Thus the term “state sovereignists” is my own and, I think, seems to aptly illustrate the position of those who worked against the Treaty.

<sup>13</sup> Franklin to Livingston, December 4, 1782, and John Adams to Livingston, December 4, 1782, in Francis Wharton, ed., *The Revolutionary Diplomatic Correspondence of the United States* 6 vols. (Washington D.C.: Government Printing Office, 1889), 6: 106-107.

argument. But now, they relied on the war and peace authority given to the Congress via the Articles of Confederation. In particular, on the fourth article, dealing with debt recovery, the American delegates noted that “although each State has a right to bind its own Citizens . . . it appertains Solely to Congress in whom exclusively are vested the Right of making War and Peace, to pass” measures against the subjects of another nation with which the “Confederacy may be at War.” To defend themselves further, the American commissioners noted that the article allowed the Americans also to recover their debts as a measure devoted to “justice and good Policy.” Although they relied on the Congress’ authority to wage war and make peace, for defending Article Four, the diplomats believed the Fifth and Sixth Articles were “so near to the View of Congress and the Sovereign Rights of the States as it now Stands” that no explanation was necessary. They were soon to realize their folly.<sup>14</sup>

In some ways, the brokers of American peace needed to defend themselves. The instructions they received from Congress and Livingston, as noted in the previous chapter, contained explicit orders to forbid any debt recovery, while Congress went even further and sought to have all exiled Loyalists barred from returning to the new country. The American commissioners, however, essentially ignored these instructions and incorporated into the treaty provisions that contradicted their orders. To be sure, they believed, correctly it turned out, that by conceding some ground on the Loyalists the

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<sup>14</sup> The American Negotiators to William Livingston, December 13, 1782, in Richard B. Morris, ed., *John Jay: The Winning of the Peace: Unpublished Papers, 1780-1784* (New York: Harper and Row, 1980), 441.

United States would gain several critical demands such as navigation of the Mississippi River, large national boundaries, and fishing off Nova Scotia.<sup>15</sup>

Ignoring the instructions was one thing and could easily be forgiven, but the clear violation of the states' sovereignty as embodied in Articles Four and Six was another. According to the states, these two articles violated the federalist principles that constituted the American union. Although all politically minded Americans understood and accepted Congress' authority in peace and war making, these powers did not, and were not, intended to interfere with the domestic policy of states. But Articles Four and Six did just that. Knowing the nature of American federalism, and even relying upon them in the negotiations, the peace delegation must have suspected that the issue of debt recovery (Article Four) and barring the states from any future confiscation and persecution (Article Six) would evoke some serious resistance from states. In fact, the Commissioners knew they had violated this principle, thus their hollow-sounding explanation and reliance upon Congress' foreign policy powers. These two articles, moreover, attempted to alter fundamentally the crux of authority for Loyalist reintegration. During the Revolution, the Continental Congress made several recommendations on how to handle Loyalists, yet the individual states pursued their own policies, whether or not they corresponded with Congressional recommendations. With the Treaty, however, a national policy regarding debts and future persecution emerged – however haphazardly followed. Even the fifth article of the Treaty followed the practices

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<sup>15</sup> In the short term these conditions proved very advantageous for the Americans, if only because they ended the war and granted formal American independence. Yet, as the Confederation, and later, Federal Republic, struggled to gain legitimacy abroad and authority at home, these conditions became problematic because of England's refusal to remove its troops from the Northwest post. England's refusal to remove its soldiers became a serious point of contention between the two nations in the early 1790s and was one of the key factors leading to the Jay Treaty of 1794. See Samuel F. Bemis, *Jay's Treaty: A Study in Commerce and Diplomacy* (New York: Macmillan, 1924) and Charles R. Ritcheson, *Aftermath of Revolution: British Policy towards the United States, 1783-1795* (Dallas: Southern Methodist University Press, 1969), 49-69.

established during the war, by allowing Congress only to recommend that the states reinstate Loyalist property. A national moratorium on confiscations as well as a universal amnesty and attempt at debt recovery may have appeared to be a necessary step for reconciliation, but in reality, as we will see, it only hampered the effort to assimilate.

Nonetheless, if the American peacemakers thought they needed to defend their actions to Congress regarding the Loyalist treaty provisions, or at least explain their reasoning behind the measures, they were wrong. While a small number of Congressional members grumbled against the Loyalist treaty provisions, Livingston, in an official letter to the American delegation, expressed an understanding about why the Americans included the Tory provisions in the Treaty. But, the Foreign Secretary did request a clarification on a vital aspect of Article Five. “What for instance,” he asked, “is intended by *real British subjects*?” The Secretary believed that the vagueness of the phrase favored the United States as the clause “operate[d] nothing in [Loyalists] favor in any State in the Union.” Nonetheless, for the next several years, attempting to answer the question of who “real British subjects” were would both assist and frustrate attempts at reintegration.

Livingston’s effort to assuage the diplomats worry appears to have been more for their consciences than his own personal beliefs. The Secretary realized, rather acutely, the opposition in the states to the Loyalist articles.<sup>16</sup> In fact, the signed Provisional Treaty of November 30 reached the Congress on March 12, 1783, but the Secretary

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<sup>16</sup> Livingston to the Peace Commissioners, March 25, 1783, Nathaniel Greene, March 12, 1783, and Livingston to Washington, March 12, 1783, in Wharton, *Revolutionary Diplomatic Correspondence*, 6: 338, 287-288, 291-292.

hesitated to submit the Treaty to the states.<sup>17</sup> Part of this delay derived from Congress waiting during the summer of 1783 for the definitive treaty and any possible changes it might bring (although it ended up being the same as the Provisional), as well as requesting the American delegation to attempt to obtain even better British concession. The main reason for the delay, however, stemmed from the Congress not knowing the exact date the Treaty could start being enforced. Several members of Congress were not clear as to who believed the treaty provisions too vague to enforce.<sup>18</sup> Despite the uncertainty, but given the controversial nature of Articles Four, Five, and Six, it is very likely that “the provisional articles, which were very differently interpreted by different members” were the Loyalist articles of the Treaty. Because a general consensus arose over “extreme inaccuracy & ambiguity as to the force of those articles,” Congress established an investigative committee to determine whether the provisional peace agreement could start to be enforced.<sup>19</sup>

The committee, which consisted of distinguished or rising members of Congress, such as Alexander Hamilton, Oliver Ellsworth, James Madison, and Ralph Izard, reported that Congress should order the States to remove the impediments to implementing Articles Four and Six of the treaty and “earnestly recommended” to the States to conform to the fifth article as well. Instead of acting upon the report, Congress, with Hamilton as the only dissenting vote, re-committed the report and decided that the Provisional Treaty did not need American adherence since the terms of the Treaty – particularly articles

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<sup>17</sup> *Journals of the Continental Congress*, Worthington C. Ford, ed., 34 vols. (Washington, D. C.: 1904-1937), 25: 924 [hereafter cited, *Journals of the Continental Congress*].

<sup>18</sup> The *Journal* records are not clear as to whom.

<sup>19</sup> *Ibid.*, 25: 958.

Four through Six – were “distant, future, and even contingent” effect. Essentially, the Committee believed that only the definitive treaty needed American adherence.<sup>20</sup> As before, it is not clear why the report was immediately re-committed, but during discussion of the report, Congress received letters from Virginia and Pennsylvania regarding the repayment of debts, which may have had some influence. The letters, particularly Virginia’s, relied upon the federalist nature of the Union, its respective states being sovereign entities, and its effects upon post-war Loyalist treatment. Of the two letters, Virginia’s was the most explicit, instructing its Congressional delegation “neither to agree to any restitution of property confiscated by the State, nor submit that the laws made by any independent State of this union be subjected to the adjudication of any power or powers on earth.” Although sent before receipt of the Provisional Treaty, the timing did not matter because what the Old Dominion reported to Congress was that Virginia, and Virginia alone, would determine its policies towards Loyalists and would view any outside attempt to force a Loyalist policy as an infringement upon its sovereignty.<sup>21</sup>

Pennsylvania’s and Virginia’s letters could have influenced Congress’ view of the Treaty. The Committee created to determine the Provisional Treaty’s implementation reported that the fifth article of the Treaty “implied that the states may judge for themselves how far they will comply with that requisition.” Regarding Articles Four and Six, the Committee stated that the treaty made these articles inviolable,

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<sup>20</sup> *Ibid.*, 24: 371-372; 25: 959. Interestingly enough, the motion and second to recommit the report came from Richard Peters and Ralph Izard, both members of the committee issuing the report.

<sup>21</sup> *Ibid.*



requiring the states' acquiescence.<sup>22</sup> Even within Congress, debates raged throughout the summer over whether the Provisional Treaty could be enforced and more importantly what provisions required state or congressional enforcement.<sup>23</sup> The core question congressional members considered regarding the timing of the Treaty's enforcement centered on whether Congress or the States possessed the authority to carry out the three Loyalist articles.

At this early point in the reception of the Treaty, the schism between State Sovereignists and Nationalist had not yet emerged as most Congressional members agreed the States had little choice but to enforce the fourth and sixth articles of the Treaty. The real debate over these articles centered on the timing of the enforcement of the articles. For example, Massachusetts Congressional member, Stephen Higginson, argued to Samuel Adams in May, 1783, that the "States ought seriously" to take measures to comply with Articles Four and Six not only because "good faith and sound policy" required it, but also because the Article Six "appears to be explicit and absolute."<sup>24</sup> Robert Livingston believed closely with Higginson on the absolute nature of Article Six, but he maintained that its provision required immediate State adherence because the Provisional Treaty needed to be treated as legally binding. Hamilton pushed Livingston's argument on the legal aspect of the Treaty even further in a letter to New York Governor

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<sup>22</sup> *Ibid.*, 373. In Congress' *Journal*, this report has been struck-out; I have been unable to determine why.

<sup>23</sup> Robert Livingston to the Peace Commissioners, April 21, 1783; Livingston to Marquis De La Fayette, May 1, 1783; Livingston to the Peace Commissioners, May 31, 1783, in Wharton, *Diplomatic Correspondence*, 386-387, 404-405, 458-459; Stephen Higginson to Samuel Adams, June 10, 1783, in Paul H. Smith, ed., *Letters of Delegates to Congress*, 25 vols. (Washington, D.C.: Library of Congress, 1976-2000), 20: 316-321 [hereafter cited: Smith, *Letters of Delegates*]; Alexander Hamilton to George Clinton, June 1, 1783, in Harold Syrett and Jacob Cooke, eds., *The Papers of Alexander Hamilton*, 27 vols. (New York: Columbia University Press, 1957-1981), 3: 367-372 [hereafter cited: Hamilton, *Papers*].

<sup>24</sup> The *Journal* of the Continental Congress did not record the debates but information on the debates can be obtained from the numerous letters Congressional members, a good number of which are cite here and below. Stephen Higginson to Samuel Adams, May 20, 1783, in Smith, *Letters of Delegates*, 20: 317-320.

George Clinton in which the young New Yorker asserted that “no part of the 6<sup>th</sup> [article] can be departed from by them without a direct breach of public faith and of the confederation.” Hamilton’s later political foil, Thomas Jefferson, essentially agreed with this nationalist argument, telling Philip Turpin, whom some Virginians suspected to be a Loyalist, that Article Six of the Treaty was “not liable to be altered or repealed by any one of them [i.e. States],” as the Confederation and not individual States consented to the terms.<sup>25</sup>

While quibbles persisted over the enforcement of the fourth and sixth articles – with agreement that the articles demanded acquiesce little disagreement can be found regarding Article Five of the Treaty. With few exceptions, Congress believed the fifth article was nothing “but a recommendation” for the States to follow or dismiss as they pleased. Most Congressional members were realistic concerning how the states would receive Article Five. “The whole of [the fifth article,]” one Congressman wrote, “is but a recommendation, which the wisdom of each state will not hesitate to reject.”

Congressional members were well versed in the nature of the American federalism and its implications for the Treaty. The states would, it was commonly assumed, “act with freedom, as they think proper” in implementing that aspect of the Treaty.<sup>26</sup>

Congressional members were right to believe in a state’s right to accept or reject the fifth article. As previously discussed, Congressional recommendations left the acceptance or refusal of the measure squarely in the hands of the States; Article Five was no exception.

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<sup>25</sup> Livingston to American Peace Commissioners, March 25, 1783, in Wharton, *Diplomatic Correspondence*, 6: 348-353; Hamilton to Clinton, June 1, 1783, in Hamilton, *Papers*, 3: 368; Thomas Jefferson to Philip Turpin, July 29, 1783, in Julian P. Boyd, et al., eds., *The Papers of Thomas Jefferson*, 33 vols to date (Princeton: Princeton University Press, 1950-), 6:324-330 [hereafter cited, Jefferson, *Papers*].

<sup>26</sup> Gunning Bedford, Jr. to Nicholas Van Dyke, March 12, 1783, Samuel Holten to Samuel Adams, May 14, 1783, and Higginson to Adams, May 20, 1783, in Smith, *Letters of Delegates*, 20: 3, 253, and 259.

### **States react to the Treaty, 1783: State Sovereignists Seize the Initiative**

Because of the inability of Congress to control the proper time and measures for the implementation of Provisional Treaty, let alone each member's individual perspective as to which provisions should be enforced and when, the states did not receive official word of the Provisional Treaty until October 1783. Even then, Congress only informed the states that England and America had accepted the provisional measures. At that time, Congress did not recommend adherence to the Treaty's stipulations, but instead wanted to wait for the definitive Treaty.<sup>27</sup> That document did not reach Congress until late 1783, but because of some difficulty obtaining a quorum, Congress did not ratify the final Treaty until January 14, 1784. With the official ratification, Congress finally recommended to the States their adherence to the three Loyalist provisions of the Treaty.<sup>28</sup> Thus for roughly ten months, from April 1783 to January 1784, the policy decisions over reintegrating Loyalists lay solely in the hands of the states.<sup>29</sup>

This ten-month period between the provisional and definitive treaties was both fortuitous and detrimental to any attempt at reintegration. During this period, the state

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<sup>27</sup> *Journal of the Continental Congress*, 25: 716-717; Elias Boudinot to the States, October 29, 1783, in Smith, ed., *Letters of Delegates*, 21: 126.

<sup>28</sup> *Ibid.* For an account on Congress' struggle obtaining a quorum see Thomas Mifflin to William Livingston, December 24, 1783, in Carl Prince, ed. *The Papers of William Livingston*, 5 vols. (New Brunswick: Rutgers University Press, 1979-1988), 5: 73-74 [hereafter cited Livingston, *Papers*]; Thomas Jefferson to James Madison, January 1, 1784 in James Morton Smith, ed. *The Republic of Letters: The Correspondence between Jefferson and Madison*, 3 vols. (New York: Norton, 1995), 1: 289-290; Jefferson to Edmund Pendelton, December 16, 1783, and Jefferson to Wilson Cary Nicholas, December 31, in Jefferson, *Papers*, 6: 387, 433. The inability of achieving quorum hampered the ratification because, according to the Article Nine of the Articles of Confederation, nine states were needed to ratify a treaty. Jefferson, having returned to Congress as a delegate from Virginia, had opposed attempts to have the Treaty confirmed by only seven of the States. In early January, he submitted a compromise measure that would have allowed the seven states to confirm the Treaty and inform the Peace delegation of the temporary approval while waiting for the official ratification. This plan, submitted to the Congress, was not implemented because the Congress met its quorum. Jefferson, "Resolution Opposing Ratification of the Definitive Treaty by Less than Nine States," December 27, 1783; "Compromise Motion concerning Ratification of the Definitive Treaty," January 2, 1784; "Report of the Committee on Jefferson's Compromise Motion concerning Ratification," January 3, 1784, all in Jefferson, *Papers*, 6: 424-426, 438-442.

<sup>29</sup> For a similar point, see Roberta Tansman Jacobs, "The Treaty and the Tories: The Ideological Reaction to the Return of the Tories, 1783-1787" (PhD Dissertation, Cornell University, 1973): 53-54.

and local governments decided their policies towards delinquent members of their own communities. The benefit to Loyalists of the delay was that, as upcoming chapters will demonstrate, a process of ideological and legal change transpired allowing for the assimilation of the Loyalists. Had the Treaty of Peace and its provisions been proclaimed upon first receiving the Provisional articles, in all likelihood the assimilation that occurred as a response to this ideological and legal change would have been significantly more drawn out or simply would not have happened. The reason for this is easy enough to understand: Loyalism was a problem on the state and local levels and the time between the Treaty arriving in the new nation and its actual ratification allowed the states to determine how, or if, they wanted to reintegrate Loyalists.

Ironically, however, the Treaty of Peace and the Loyalist provisions were actually more hurtful to assimilation than anything else. In the two-year period following the conclusion of the War and before the contents of the Treaty became public, it appears that many states, despite the web of legality aimed at preventing their return, allowed for a generally peaceful reintegration of the Loyalists, or at least those who had not borne arms against the Patriots. In Massachusetts, for example, the General Court permitted several Loyalists to return. Although some of these returnees had to pay fines or spend an hour in the stocks, their return was nonetheless peaceful and mostly uneventful. In some cases, Loyalists returned without any legislative interference and often resumed a peaceful co-existence.<sup>30</sup> In Virginia, the legislature and governor granted pardons to

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<sup>30</sup> David E. Mass, "The Return of the Massachusetts Loyalists" (PhD Dissertation, University of Wisconsin, 1972), 416-419, 442; Timothy Pickering to Mrs. Higginson, June 10, 1782, and Joseph Orne to Pickering in Octavius Pickering, *The Life of Timothy Pickering*, 2 vols. (Boston: Little, Brown, and Company, 1867), 1: 363-364, 364-365; Fitch Edward Oliver, ed, *The Diary of William Pynchon: A Picture of Salem Life, Social and Political, a Century Ago* (Boston: Houghton, Mifflin, and Co, 1890), 123.

several suspected Tories who were on trial for treason or were captured in last days of the War. The state also allowed several suspected Tories the right to travel unmolested.<sup>31</sup>

Yet, the publication of the Provisional articles of peace in early 1783 dashed any hopes of an easy return of the Loyalists. Across the Confederation, various celebrations took place hailing the end of the Revolution and the securing of peace.<sup>32</sup> But these exuberant celebrations led to a terrible hangover once the full implication of the Loyalists articles were realized. At that point, the celebrations turned acrimonious with returning Loyalists as the primary target. For example, when David Black returned to Boston in May of 1783 to recover debts, the town's Committee of Safety promptly arrested him and kept him confined in jail for eleven months.<sup>33</sup> In Virginia, whereas months before it appeared that some former Loyalists would have a peaceful return, the Governor issued a proclamation barring the return of any Tory.<sup>34</sup> A Boston town meeting passed a resolution forbidding the return of any Loyalist and it instructed the town's Committee of Correspondence to "oppose every Enemy . . . and declared Traitors to their Country."<sup>35</sup> Loyalists throughout New York, and particularly in New York City, met a violent fate as New Yorkers tarred, feathered, and "whipped in the most inhumane manner" any openly avowed Tory. Also in New York, Dutchess County proceeded in September 1783 to

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<sup>31</sup> Samp[?] Mathews to Thomas Nelson, July 7, 1781, in William P. Palmer, ed., *Calendar of Virginia State Papers*, 11 vols, (Richmond: James Goode, 1881), 2: 207 [hereafter cited, Palmer, *Virginia State Papers*]; Colonel John Syme to the Governor, January 9, 1782, Colonel L. Wood, Jr. to the Governor, February 8, 1782, and William Reynolds to the Governor, December 17, 1782, Palmer, *Virginia State Papers*, 3: 12,56, 251, 400.

<sup>32</sup> Pickering, *Life of Timothy Pickering*, 477; *South Carolina Gazette*, April 26, 1783, *Maryland Journal*, April 22, 1783.

<sup>33</sup> E. Alfred Jones, ed., *The Loyalists of Massachusetts: Their Memorials, Petitions, and Claims* (London: Saint Catherine Press, 1930; reprint: Baltimore: Genealogical Publishing Company, 1969), 35.

<sup>34</sup> Proclamation of December 19, 1782, in Palmer, *Virginia State Papers*, 3: 400.

<sup>35</sup> Boston Town Meeting, April 7, 1783 in Record Commission, Report 80, "A Report of the Record Commissioners of the City of Boston Containing the Boston Town Records, 1778-1783" (Boston: Rockwell and Churchill, 1895), 306-307.

banish a known Loyalist who had resided in the country throughout the course of the Revolution.<sup>36</sup> South Carolina witnessed perhaps the worst Treaty-inspired violence. Throughout July 1783, Charleston, which the British evacuated less than a year earlier, was plagued with a series of violent mob riots, one of which burned a wharf owned by Christopher Gadsen, a known Tory-sympathizer, because it contained Loyalist goods. Another mob “pumped” several Loyalists who it believed were “obnoxious to the state.” This mob also imprisoned Loyalist Dr. William Wells, who returned to the city to collect debts. The goal of the rioters was simple: to influence the legislature against the Provisional articles and any return of the Tories. When the mob action calmed later in the month, a large town gathering numbering in the thousands met and resolved against allowing the return of any person who supported the British cause.<sup>37</sup>

While Loyalists faced extra-legal action from local communities in various locations throughout the Confederation, the state legislatures also reacted negatively towards the Treaty in 1783. The Virginia legislature vetoed a citizenship bill authored by John Taylor of Caroline because the measure only excluded from citizenship Loyalists who openly fought against Virginia and the United States. Earlier in May, Patrick Henry suffered a rare legislative defeat when his bill to lower barriers against migrating

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<sup>36</sup> Thomas Jones, *History of New York during the Revolution, and of the Leading Events in other Colonies during that Period*, Edward de Lancey, ed., 2 vols. (New York: New York Historical Society, 1879), 2: 244, 505; Alexander Flick, *Loyalism in New York during the Revolution* (New York: Columbia University Press, 1901), 163; Rick Ashton, “The Loyalist Experience: New York, 1763-1789” (PhD Dissertation, Northwestern University, 1973): 174.

<sup>37</sup> For these mob actions in Charleston, see *The Charleston Gazette*, July 8, 15, 22, 30; *Gazette of the State of South Carolina*, July 23, 1783. For contemporary, and highly unfavorable, remarks on the mob action see David Ramsay to Benjamin Rush, July 11, 1783, in Robert L. Brunhouse, ed., “David Ramsay, 1749-1815, Selections from his Writings” *American Philosophical Society, Transactions*, 55 (1965): 65. For secondary works on these mob actions see Charles Gregg Singer, *South Carolina in the Confederation* (Philadelphia: Privately Printed, 1941; reprint, Philadelphia: Porcupine Press, 1976), 116; Robert Lambert, *South Carolina Loyalists* (Columbia: University of South Carolina Press, 1987), 289-291.

Loyalists was tabled.<sup>38</sup> North Carolina joined its neighbor in denying citizenship to former Loyalists, as well as watering down an amnesty bill to render it ineffective and pointless. The state also enacted a measure that indemnified its citizens from lawsuits brought about by Loyalists. New Jersey, despite permitting Tories a generally peaceful reentry to the state, nonetheless enacted a measure that would render any Loyalist or otherwise suspected Tory “incapable forever” the holding of any public office. Meanwhile, Maryland forbade any Tory attorneys from practicing law. Massachusetts and South Carolina continued to sell off confiscated Loyalist property.<sup>39</sup> In May of 1783 New York passed its infamous Trespass Act, which allowed New York City patriots who had fled when the British occupied the city, to collect damages from Loyalists use of their property.<sup>40</sup>

Historians examining the individual state’s responses to the Treaty have concluded that all the official measures were clear violations of the peace agreement.<sup>41</sup> This conclusion, however, ignores the simple fact that in 1783 Congress had not yet

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<sup>38</sup> Joseph Jones to James Madison, June 8, 1783, in Worthington C. Ford, ed., *Letters of Joseph Jones of Virginia 1777-1787* (Washington, D.C.: Department of State, 1889), 116; May 24, 1783, May 26, 1783, December 2, 1783, *Journal of the House of Delegates of Virginia*, (Richmond: N.P. 1783): May Session, 31, 34 and October session, 76. Virginia’s Citizenship debate will be covered in chapter 6.

<sup>39</sup> Walter Clark, ed., *The State Records of North Carolina* 26 vols., (Raleigh: P.M. Hale, 1886-1907), 24: 488-490; 19: 343 [hereafter cited, Clark, *State Records of North Carolina*]; Archibald Maclaine to George Hooper, April 29, 1783, May 29, 1783, in Clark, *State Records of North Carolina*, 957-959, 963; New Jersey, *Journal of the Proceedings of the Legislative Council of the State of New Jersey*, October session (Trenton: Isaac Collins, 1784), 24 [hereafter cited: *New Jersey Legislative Council*]; Maryland, *House of Delegates* (Annapolis: Frederick Green, 1783), May 27, 1783, 42; New York actually passed to bills for the sales of confiscated property. “An Act for the Immediate Sale of Certain Forfeited Estates,” April 6, 1784, and “An Act for the Speedy Sale of the Confiscated and Forfeited Estates within this State and for Other Purposes therein Mentioned,” May 12, 1784, both in *Laws of the Legislature of State of New York in Force against Loyalists*, n.e. (London: H. Reynell, 1786), 122 [hereafter cited, *New York Laws against Loyalists*], 41-85; Maas, “Return of the Massachusetts Loyalists,” and Thomas Cooper, ed., *Statutes at Large of South Carolina*, 10 vols. (Columbia: A.S. Johnston, 1836-1841), 4: 553-554, 568-570. For a great breakdown of the various measures the States adopted against Loyalists during 1783, see Tansman, “Treaty and the Tories,” 90-115, and Allan Nevins, *The American States During and After the Revolution, 1775-1789* (New York: Macmillan Co., 1927), 644-656.

<sup>40</sup> Trespass Act, *New York Laws Against Loyalists*, 122.

<sup>41</sup> Morris, *Forging the Union*, 196-202; Merrill Jensen, *New Nation*, 261-272.

ratified the Treaty, something that defenders of the measures pointed out. To be sure, the states knew of the Treaty's provisions, however Provisional they were at that point, and must have realized that, if Congress officially approved the document, then most of their anti-Loyalist measures would run counter to it. There was another reason why these anti-Loyalists measures were not yet violations of the peace treaty. Since the Treaty had yet to receive Congressional ratification, these measures were clearly part of the internal business of the states, thus falling within the parameters of the federalist system.

Throughout 1783, all across the Confederation various local communities enacted resolutions or published instructions to their representative regarding the Treaty and returning Loyalists. Their views on both were not favorable. To a large degree, republican ideology drove the opposition to returning Loyalists, as the next chapter details, but another reason centered on reintegration being “the worst of policy and the greatest injustice to the interest of the zealous supporters of our liberty.”<sup>42</sup> At the local level, where reintegration would be not just an idea or policy goal but an actual phenomenon, the prospect of returning Loyalists frightened and angered many. These emotions derived from the fears of local residents – no matter how real or imagined – of the influence Loyalists might have upon the political and social character of their area. A meeting of the Worcester, Massachusetts, freemen exemplifies this attitude. “[T]he sentiments of the absentees (i.e. returning Loyalists) their principles, their languages, and their feelings” are “fixedly opposed to those rights, and to that freedom” Patriot Americans shed blood for. As a result, the town, as did so many across the country,

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<sup>42</sup> Proceedings of the Freeholders and Inhabitants of Amenia precinct, in Dutchess County, in *The Pennsylvania Packet*, July 19, 1783.



voted not to accept any returning Tories, believing that the chance of former Loyalists becoming “good subjects” was “groundless and fallacious.”<sup>43</sup>

Numerous towns across the country, of which Worcester was just one, determined not to readmit returning Loyalists. This plan was just one part of the equation; the other was not accepting or endorsing the Loyalist articles of the Treaty, particularly Articles Five and Six. The core argument against these provisions focused on the how they violated the sovereignty and independence of the individual states by essentially forcing a reintegration of Loyalists. Resolutions and anonymously authored essays reminding Congress of the nature of American federalism appeared throughout newspapers 1783 and 1784. “Brutus” reminded his fellow New Yorkers that “these states are sovereign and independent” and as such did not need to endorse those Treaty provisions. Articles Five and Six, he continued, “contain the seeds of inexhaustible feuds and animosities between Whigs and Tories,” meaning that the result of a forced incorporation because of the Treaty would be tumult and chaos.<sup>44</sup>

A recurring theme of these petitions was the federalist nature of reintegration. The citizens of Lexington, Massachusetts resolved that “[w]hile we sincerely wish, That the Faith of the Nation” regarding the conclusion of peace, “might be realized . . . we also wish that *the Freedom, Independence and Sovereignty of these States*, respectfully considered, might not be forgotten.” Another town meeting in Essex County, New Jersey, issued a similar resolve in their letter to their fellow New Jerseyians. “We know

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<sup>43</sup> A Meeting of the Freeholders and other Inhabitants of the Town of Worchester (Massachusetts), May 22, 1783, in *The Pennsylvania Packet*, June 19, 1783. Also see the “Petition of Inhabitants and Freeholders of Amerhest County, Virginia” and “Petition of the Inhabitants of Essex County, Virginia” June 6, 1783, in Virginia Legislative Assembly, Petitions, 1782-1789.

<sup>44</sup> “Brutus,” “To the Friends of Freedom and Independence in the State of New York,” April 12, 1783, in *The Independent Gazetteer; or The Chronicle of Freedom*, May 10, 1783.

not” they said, “on which principles it can be expected that the recommendations made, or to be made, by Congress” regarding the fifth article “will be complied with by a single state in the Union.” The inability of the town to determine why any state would follow Congress’ recommendation stemmed from the federalism of the American Confederation. The Essex County letter summarized this notion when it asserted that “altho’ Congress must earnestly,” recommend the restoration of Loyalist estates, “*the Legislatures are not obliged to comply.*” To do so would permit “the blessings of freedom and independence [upon] persons” who engaged in “machinations” for British domination. Should the town or state allow the admittance of Loyalists, the letter concluded, “bloodshed and murders will be the inevitable consequence.”<sup>45</sup>

In Virginia, Meriwether Smith, in a July 1783 pamphlet, strongly indicted Articles four and five of the Treaty. While Smith cringed at the implications of paying debts to British and Loyalist merchants, he relied mainly upon federalism to carry his argument. Smith’s contention synthesizes the state sovereignty critique of the three articles better than most. He claimed Virginia (and by implication, the other states) had no obligation to insure Loyalists could recover their debts. Smith, perhaps better than any other critic, distinguished the relationship between the Confederation Congress, the states, and the people. He noted that the Congress was composed of the states, not the individual people of those states. In turn, the state governments, controlled by the citizens of that state, were the more responsive than a central government? to the people’s needs. Thus, any

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<sup>45</sup> “At a Meeting of the Freeholders and other Inhabitants of the Town of Lexington, Legally Assembled,” May 22, 1783, in *The Boston Gazette*, June 9, 1783; “To the Respectable inhabitants of the County of -----, in the State of New Jersey,” May 19, 1783, in *The New Jersey Gazette*, June 4, 1783.

attempt by Congress to force the individual citizens of a State to acquiesce to the Loyalists articles of the Treaty was unconstitutional. As he noted

How far this stipulation [Article Four] on the part of the *ministers of congress* is consistent with the *sovereignty* and *right of legislation* of an individual state is worthy of consideration, and perhaps it will be found, that being *contrary to the laws of the state*, and those rights of the citizens *derived from the Revolution and the positive law of the state*, that the *minister of congress* had no right to stipulate in the *manner* they have agreed as to the 4<sup>th</sup> article, and consequently that there is no authority to carry it into execution but that which arises from the *consent* of the *legislature* of the state *of the individual interested therein* . . . For, the ministers of Congress to say then, that there shall be no lawful impediment to the recover of the full value of their debt . . . is subjecting the citizens *within the state* to their authority, and directing a repeal of such laws as they disapprove . . . it is depriving the state of its *sovereignty* and *independence* reserved by the Confederation.<sup>46</sup>

While this passage addresses Article Four of the Treaty, it works just as easily for the fifth and sixth articles. Later in the pamphlet, Smith employed the same federalist argument against those articles; thus, these measures violated the states' authority to deal with their own internal legislation and peace.

It would be easy to dismiss Smith's argument and the other examples of local communities' distaste for the Loyalist articles as nothing more than platitudes used to stir the recent emotional events of the Revolutionary War. But doing so would be a mistake. As these public documents make very clear, Loyalists assimilation was directly linked with the issue of federalism. What is more, the sentiments expressed in these local resolutions demonstrate the degree to which everyday Americans, and not just the elites, as so many historians claim, understood and paid attention to the politics of the period. It also demonstrates in a manner most scholars of the period have overlooked how ordinary Americans understood well the workings of the governments their social betters had

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<sup>46</sup> Meriwether Smith, "Observations on the Fourth and Fifth Articles of the Preliminaries for a Peace with Great Britain designed for the Information and Consideration of the People of Virginia" (Richmond: Dixon and Holt, 1783), 1-28, block quote on 4, also see pg. 11 for a similar remark on article five.

constructed. Relying on the federalist structure of the Union, the citizens of these local areas expressed their belief that they knew firsthand and better than Jay, Adams, Franklin, or the Continental Congress, the true ramifications of having former Tories part of the polity. In 1783 and 1784 they were not optimistic about the future of the assimilation process. Yet, as we shall see, this skeptical outlook would undergo important changes.

### **The Reaction Continued, 1784**

Even after Congress ratified the Definitive Treaty early 1784, Loyalists fared no better as state after state continued to pass measures aimed at preventing Loyalists from recovering debts or becoming citizens. New York denied citizenship petitions for twenty-six Loyalists and enacted an alien bill which prevented any Loyalist from seeking citizenship.<sup>47</sup> New York along with Massachusetts enacted legislation to continue the sale of confiscated Loyalist property. The Bay State also passed a measure entitled “An Act for Asserting the Right of this Free and Sovereign Commonwealth to expel such Alien as may be Dangerous,” which declared that any person who voluntarily fled the state between October 1774 and 1780 forfeited the right of citizenship and, what is more, their estates were permanently turned over to the state.<sup>48</sup> Attempts in Pennsylvania to repeal its 1777 Test Act, which required the taking of an oath to obtain citizenship, resulted in a huge political battle that would last for several years and led to the tabling of any revision to the measure. Some agreement could be found in Pennsylvania, however,

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<sup>47</sup> New York Assembly, *Journal*, March 8, 1784, April 1, 1784, April 12, 1784, 65-66, 102, 120; New York Senate, *Journal*, April 28, 1784; *New York Journal*, April 8, 1784, and *New York Journal and Gazette*, April 29, 1784. The Alien bill, the title of which was “An Act of Preserve the Freedom and Independence of this State,” can be found in *New York Laws Against Loyalists*, 111-117.

<sup>48</sup> Massachusetts General Assembly, March 24, 1784; *A Collection of the Acts or Laws passed in the State of Massachusetts Bay, relative to the American Loyalists and Their Property*, n.e. (London: John Stockdale, 1785), 26-35.

because while debating the repeal of the Test Act, the State empowered the Supreme Executive Council to sell the property of its most notorious Tory, Joseph Galloway.<sup>49</sup> New Jersey legislated the sale of confiscated lands in Bergen County while North Carolina followed suit and passed its own legislation for selling any remaining confiscated property.<sup>50</sup>

These legislative actions were coupled with extra-legal measures taken by local communities throughout the country. In the Ninety-Six district of South Carolina, John Love, a fierce Loyalist who supported the British Army when it entered the state in 1780, returned in the summer of 1784 only to be immediately imprisoned. When Judge Aendus Burke, a believer in the need to peacefully reintegrate returning Loyalists, annulled the charges against the Tory, a mob exacted its own justice and lynched Love.<sup>51</sup> Dr. Samuel Stern, a Boston Tory who had suffered persecution throughout the Revolution, also fell victim to a violent mob when attempting to travel through his former home state on his way to Nova Scotia. The mob forced his wife into hard labor to stave off starvation while Dr. Stern was hauled into the Worchester jail, where he remained for thirty-five months, finally being released in 1787.<sup>52</sup>

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<sup>49</sup> *Pennsylvania General Assembly*, February 4, 1784, and September 9, 15, 16, 22, 23, (Philadelphia: Hall and Sellers, 1784), 114, 164-165, 324-325, 334-336, 345, 349-350. Also see Robert L. Brunhouse, *The Counter-Revolution in Pennsylvania, 1776-1790* (Harrisburg: Pennsylvania Historical Commission, 1942), 15-16, 161-164. For the action against Galloway, see *Pennsylvania General Assembly*, September 15, 1784, 335.

<sup>50</sup> For New Jersey, see *New Jersey General Assembly* (Trenton: Isaac Collins, 1784), December 23, 1784, 96 and Henry Brockholst Livingston to William Livingston, June 22, 1784 in Carl E. Prince, ed. *Papers of William Livingston*. 5 vols. (Trenton: New Jersey Historical Commission, 1979-1987), 5: 143; Clark, *State Records of North Carolina*, 24:661-664.

<sup>51</sup> Aedanus Burk to Governor of South Carolina in *American Museum*, 1 (1787): 121-123.

<sup>52</sup> Jones, *Loyalists of Massachusetts*, 267. Sterns documented his troubles in "Dr. Stern's Petition to His Excellency the Governor and the Honorable Council" (Worcester: Isaiah Thomas, 1785), 1-12 and "A Short History of the Treatment Dr. Samuel Sterns Hath Met in Massachusetts" (Worcester: n.p. 1786), 1-25.

Although the legality of anti-Loyalists measures that the states enacted in 1783 is debatable, the legal (and extra-legal) actions occurring in 1784 was a different story – once Congress ratified the Definitive Treaty, many of the anti-Loyalist laws, including those enacted during the Revolution, violated the Treaty. Still, some of these actions, particularly the states’ refusing to restore Loyalist property, were not Treaty violations, as they fell within the “recommendation” of Congress. Nonetheless, when legal actions did violate the Treaty, the states appeared indifferent and, given the lack of respect for and authority of Continental Congress, its no wonder the states did not care. Several states, New York, Massachusetts, and Virginia especially, enacted or debated resolutions that stated they would not follow the Treaty of Peace. The New York legislature noted that while it “entertain[ed] the highest Sense of National honor, or the sanction of Treaties, and of the deference which is due the advice of the United States in Congress assembled,” they believed that “it would be inconsistent with their Duty to comply with the Recommendation of the said United States, on the subject matter of the Fifth Article of the Definitive Treaty of Peace.”<sup>53</sup> The Virginia legislature engaged in a serious debate over whether to withhold its approval of the Peace Treaty until Congress addressed the state’s grievance towards Great Britain’s removal of slaves during the War.<sup>54</sup> While the measure failed to get approval, Virginia nonetheless did nothing to approve the document. It bears repeating that the disregard for the Treaty did not hamper the successful assimilation of Loyalists. To be sure, those who fled to England or Canada were familiar with some of the ill-treatment their fellow Loyalists received upon returning, but they returned nonetheless in hopes of acquiring their property or debts

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<sup>53</sup> New York Senate, March 30, 1784, 74.

<sup>54</sup> Virginia House of Delegates, October 1784, 41, May 1784, 54, 72, 74.

owed or simply to resume their lives.<sup>55</sup> Although in 1784 the states were in technical violation of the Treaty, the lack of an enforcement mechanism in Congress left the issue in the hands of the states. But, in many ways, this lack of Congressional enforcement was a blessing in disguise. By leaving the issue of Loyalist integration on the state and local level, it could play out in the manner that allowed the citizens of each individual state, as well as the state legislatures, to express their views on the issue and determine how best to address the issue of returning Loyalists.

### **The Nationalists Counter-Argument**

Not all Americans supported the actions of the states or shared the sentiments of the various local committees. The Nationalists, the group who generally supported a stronger central government, were particularly outraged by the states' seeming disregard for the Treaty's provisions. While this group recognized and respected the federalist aspect of the peace treaty, particularly the fifth article, the Nationalists attacked those interpretations permitting the disregard of the other Loyalists articles.<sup>56</sup> Hamilton, for example, told Governor Clinton that "it has been said by some men that the operation of this treaty is suspended 'till the definitive treaty – a plain subterfuge. Whatever is clearly expressed in the Provisional treaty is as binding from the moment it is made as the definitive treaty which in fact only develops explains and fixes more precisely what may have been too generally expressed in the former."<sup>57</sup> Hamilton, whose understanding of federalism has been underappreciated by historians, realized that Article Five, even when ratified, fell under the domain of the states. He correctly asserted that Congress

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<sup>55</sup> Mary Beth Norton, *The British-Americans: The Loyalists Exiles in England: 1774-1789* (Boston: Little, Brown, and Co., 1972), 223-260; Maas, "Return of Massachusetts Loyalists," 453-456.

<sup>56</sup> Hamilton to Clinton, June 1, 1783, in Hamilton, *Papers*, 3: 369.

<sup>57</sup> *Ibid.*

possessed authority over war and peace but he mistakenly believed that the states had to follow what was not yet official.

Regarding the Treaty, the Nationalists had several important goals. First, the states needed to respect the Congress' authority to conduct peace talks and ratify treaties. Their second objective concentrated on the states and the populace considering the peace Treaty as "higher law," meaning that it was supreme over the individual state's laws. These two goals flowed into their third and ultimate end for the Treaty: its acceptance and enforcement by the states. The Nationalists' desire for strict adherence to the Treaty also meant that they viewed the reintegration of Loyalists as a national issue, not a subject restricted only for the state and local governments. In the immediate aftermath of the provisional Treaty's arrival and its official ratification by Congress, however, the Nationalists failed to achieve their aims; only after a noticeable ideological and jurisprudential changes – all of which will be discussed in the next three chapters – among Americans did the States begin to seriously adhere to the Treaty. By that point, however, the Loyalists were reintegrated.

In 1783 and 1784, the Nationalists seemed well on their way to failure, but it was certainly not pre-ordained. During this two-year period, the Nationalists asserted that the Articles of Confederation empowered Congress to make and ratify Treaties. In many ways, this was their easiest challenge. While Hamilton lamented how the States labored "to contrive methods to mortify and punish tories and to explain away treaties," the local committees that lambasted Articles Five and Six of the Treaty never actually advocated that Congress could not make treaties; in fact, the opposite was true. The local resolves protested not the ability of Congress to conduct treaties but their belief that those



particular articles interfered too much with their own local autonomy. Most of these communities agreed with the town of Roxbury, Massachusetts, when it instructed its Representative to “support all acts of Congress wherein they *exceed not* the power by that *expressly* delegated to them, and no *farther*.” Therefore, the Nationalists achieved this goal before even mounting a serious challenge, mostly because no challenge was needed.<sup>58</sup>

The argument Nationalists needed to mount successfully was that the treaty be considered part of a higher law and therefore supreme to the anti-Loyalist laws. This argument was, by far, the hardest for the Nationalists to make. The difficulty lay in the very nature of the American Union. While the Articles of Confederation permitted Congress to conduct all efforts of war and peace, the States still retained their sovereignty, remaining, in essence, independent States. As discussed in the previous chapter, many of the State legislatures and local communities viewed themselves in this manner. The conflict between the Nationalists and the State legislatures and their towns should not be too surprising given the truly unique arrangement of the American Union.

The Nationalist argument for the Treaty’s supremacy over the States began with the arrival of the Provisional treaty in early 1783. For most of that year, the central argument of the Nationalists tied the adherence of the Treaty to America’s stature abroad. If the States would not adhere to the Treaty, the Confederation could not assume a station among nations. James Iredell, a North Carolina judge and of strong Nationalist bent,

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<sup>58</sup> Hamilton to Gouverneur Morris, February 21, 1784, in Hamilton, *Papers*, 3: 512-514; “The Town of Roxbury . . . Instructions to their Representative” in *The Independent Chronicle and the Universal Advertiser*, May 29, 1783. Of course, not every town instructions or resolves expressed this belief. For example, Geesborrow, Connecticut resolved “[t]hat it is contrary to the Articles of Confederation for these states to comply with any recommendations of Congress, particularly for the payment of public debts; and that such recommendations are strong proofs of the lust for power.” This was not exactly a ringing endorsement of Congress or its treaty making powers but it was the exception and not the norm.

informed his wife that “the national character [was] disgraced, as more than one article of Treaty of Peace has been expressly violated.” Iredell worried that if such violations continued, the new country would not be a fit place to live. Jefferson believed that “proceeding in direct contraction to” the Treaty “is neither consistent with the faith of an honest individual nor favourable to the character of a nation which has that character to establish . . . or retrieve.” The Governor of Virginia informed his Congressional delegation that news from Europe demonstrated a concern and anxiety over Congress’ actions thus making the Confederations actions even more important and with international consequences. The executives of New Jersey and Maryland all implored their states to accept the Treaty’s provisions, lest the nation’s reputation falter. But it was Jay, who, while putting the finishing touches on the definitive Treaty, zeroed in on the problem when he bluntly informed Egbert Benson that the “irregular and violent popular Proceedings and Resolutions against the Tories hurt us in Europe” because it validated many leading European’s beliefs in the incapability of the people to government themselves.<sup>59</sup>

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<sup>59</sup> James Iredell to Hannah Iredell, May 21, 1783, in Griffith McGree, ed., *The Life and Correspondence of James Iredell*, 2 vols. (New York: D. Appleton and Company, 1858), 2: 51-52; Jefferson to Turpin, July 29, 1783, in Jefferson, *Papers*, 6: 330; Benjamin Harrison to Virginia Delegates, May 9, 1783, in Madison, *Papers*, 7: 30-32; William Livingston’s “Address to the Assembly,” May 19, 1783, in *Votes and Proceedings of the Seventh General Assembly of the State of New Jersey* (Trenton: Isaac Collins, 1783), 94 [hereafter cited, New Jersey, *General Assembly Proceedings*]; William Paca, “Address to the House of Delegates” May 6, 1783, in *Votes and Proceedings of the Maryland House of Delegates*, April Session (Annapolis: Frederick Green, 1783), 5-6 [hereafter cited, Maryland, *House of Delegates Proceedings*]; Jay to Egbert Benson, September 12, 1783, in Jay, *Winning the Peace*, 586-587. Numerous other examples abound. Also see George Mason to Patrick Henry, May 6, 1783 in Robert A. Rutland, ed., *The Papers of George Mason*, 3 vols. (Chapel Hill: The University of North Carolina Press, 1970), 2: 770; John Dickinson, “Message to the General Assembly” November 10, 1783, in *Minutes of the First Session of the Eighth General Assembly of the Commonwealth of Pennsylvania* (Philadelphia: Halls and Sellers, 1783), 22; “A Patriot” and “A Planter” July 15 and August 1783, both in *South Carolina Gazette and General Advertiser*; Arthur Lee to James Monroe, August 23, 1783, in Smith, ed., *Letters of Delegates*, 20: 581-582. Also see the Instructions to Delegates from Fairfax and Essex which desired their Virginia House of Delegates to “oppose, to the utmost of your power, the smallest infraction of the late Treaty of Peace.” These instructions are the rare exception to the normally anti-Loyalist sentiments.

Despite the pleadings and worries of these Nationalists, the continued measures and actions against Loyalists during 1783 illustrate that many Americans really did not care about Europe's opinion. As a result of this apparent lack of concern, the Nationalists dropped this line of argument – although they continued to lament the problem both publicly and in private – and shifted towards actually making the case for the higher law aspect of the Treaty. The Nationalists engaged this line of argumentation with determination and zeal, resolving that the States comply with the Treaty and allow for the Loyalists to peacefully return.

Even while the Nationalists argued for the Treaty's acceptance for the sake of reputation, in various states Nationalists attempted to repeal those measures conflicting with the Treaty. Starting in the spring of 1783, the legislature of North Carolina engaged in a year, long, bitter fight to repeal the laws contrary to the Peace.<sup>60</sup> During this struggle, William Hooper, whose son-in-law, Archibald McClain, was a Tory, declared that "The treaty of peace is of sacred obligation . . . that all laws . . . which contravene the compleat operation . . . of the treaty must be repealed, or the legislature be involved in the grossest solecism" by calling for the adherence to the Treaty and maintaining laws that violate it. Hooper posited in his opposition to anti-Loyalist laws the idea that the Treaty was of greater authority than his State's laws.<sup>61</sup> Despite his pleas, the North Carolina legislature failed to repeal their laws that conflicted with the Treaty.

Nationalists across the seaboard echoed Hooper's sentiments. In neighboring Virginia, James Madison, who did not share all the beliefs of the Nationalists, sat on a

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<sup>60</sup> Governor Alexander Martin, "Address to the General Assembly," April 19, 1783, in Clark, *State Records of North Carolina*, 16: 773-776.

<sup>61</sup> North Carolina House of Representatives, June 3, 1784, in Clark, *State Records of North Carolina*, 19: 716.

committee that proposed a series of resolutions which would have repealed the Old Dominion's laws transgressing the Peace Treaty. The final resolution of the set requested that the State's Congressional delegation inform the Continental Congress that the State would withhold its final approval of the Treaty until England upheld its end of the pact.<sup>62</sup> The Resolution stated that it recognized the Confederation Congress' power to negotiate treaties, and to do so at that moment would hurt the citizens of the state. Madison attempted to remove this aspect of the resolution and substitute his own call for at least some adherence to the Treaty, but his amendment suffered a strong defeat in the legislature. While he failed to convince Virginia to repeal its conflicting legislation, Madison still played a critical role in beginning to move his State into future compliance with the Treaty.<sup>63</sup>

Hooper and Madison represent an emerging Nationalist counter-attack against the State's lack of compliance with the Treaty. In South Carolina, Aedenus Burke fought almost single handedly to convince his State to repeal their laws that violated the Treaty. Nationalist-oriented politicians in Massachusetts and Connecticut engaged in their own debate to repeal the anti-Loyalists laws. The results were mixed. Massachusetts did not

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<sup>62</sup> The argument that the States would not uphold the Treaty until England fulfilled its obligations under it was commonly bantered about during Treaty ratification struggle. The primary line of argument on this topic originated primarily in the South and dealt with Article Seven of the Treaty which forced Great Britain to return captured slaves to their owners (the clause was Henry Laurens' – a slave owner from South Carolina – claim to fame on the treaty). New England had its grievances regarding Article Seven as well. Along with returning fugitive slaves, His Majesty pledged to remove troops from all Northwest posts. In both instances, by early 1784 England had not complied with these provisions. Ironically, however, England had not complied in part because it did not officially ratify the Treaty until April 9, 1784. Many of the studies that discuss the Treaty ratification assert that this argument was held only as an excuse from not complying with more odious Loyalist provisions. While it is true that a very convenient by product of this argument was the lack of enforcement of Articles Four through Six, the anger and concern of the States regarding returned slaves and removal of troops from the northwest was legitimate. However, this topic does not receive serious attention here only because it is peripheral to the subject of this chapter, namely how federalism and the treaty affected reintegration.

<sup>63</sup> "Resolutions on Private Debts Owed to British Merchants," June 7-23, 1784, in Madison, *Papers*, 7: 58-63.

repeal anti-Loyalists laws (in fact, as noted earlier, they enacted new measures against Tories) while allowing a few Tories to return. Connecticut did not repeal its laws either, but the state's legislature did officially embrace a policy of peaceful Loyalist integration that some of its local towns had started in 1783. This minor victory for Loyalist reintegration, which had more to do with republican ideology and economic interest than a desire to adhere to the Treaty, was matched in New Jersey where they too did not repeal their anti-Loyalist legislation right away, but nonetheless adopted a policy of welcoming returning Loyalists.<sup>64</sup> In Delaware and Rhode Island, where Loyalism was never strong to begin with, the laws conflicting with the Treaty were not officially repealed, but since the number of Loyalists there was so small, it really did not matter. Pennsylvania's attempt to repeal its Test Act, which violated Article Six of the Treaty, kicked off a multi-year political battle between its two rival political factions, Constitutionalists and Republicans.

### **Debating the Treaty in New York: *Rutgers v. Waddington* and the Phocion Letters**

New York, however, witnessed the most furious battle between the Nationalists and State Sovereignists. A recent examination of the Patriot and Loyalist conflict in that State contends that reintegration, while certainly not a moment of tranquility, was nonetheless achieved easily.<sup>65</sup> This interpretation misses the intense acrimony reintegration brought to New York. During the war, New York City served as the British headquarters, and thus had the largest number of Loyalists, making the issue of what to

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<sup>64</sup> Maas, "Return of the Massachusetts Loyalists," 467-520; Oscar Zeichner, "The Rehabilitation of Loyalists in Connecticut" *New England Quarterly* 11 (1938): 308-330; Richard P. McCormick, *Experiment in Independence: New Jersey in the Critical Period, 1781-1789* (New Brunswick, NJ: Rutgers University Press, 1950), 25-39. The ideological and economic aspects of reintegration will be discussed in the next chapter.

<sup>65</sup> Judith Van Buskirk, *Generous Enemies: Patriots and Loyalists in New York* (Philadelphia: Pennsylvania University Press, 2002), 155-196.

do with Loyalists and their possible return a source of serious and heated debate. From 1783 and into 1784, this dispute culminated in the Treaty of Peace and the enactment of several anti-Loyalist laws, the most famous of which, the Trespass Act, allowed New Yorkers to sue to collect debts or back rents from properties occupied during the British occupation of New York City.<sup>66</sup>

Leading the charge in favor of Treaty and against the Trespass Act was Alexander Hamilton. Regarding the Treaty and Trespass Act, however, Hamilton maintained the supremacy of Treaty of Peace over State law, therefore nullifying, in a sense, the various States' anti-Loyalist legislation and allowing for an easier return of Tories. Hamilton mounted his case in two public arenas, the courts and newspapers. From 1784 to his ascension as the first Secretary of the Treasury in 1789 Hamilton represented a number of former Loyalists in various court cases. Having passed the New York Bar in 1782, Hamilton, one historian has noted, "cut his professional teeth defending Loyalists."<sup>67</sup> Hamilton would agree with this observation, once telling Gouverneur Morris that "legislative folly has afforded me so plentiful a harvest to us lawyers that we have scarcely a moment to spare from substantial business of reaping."<sup>68</sup> But of all his various legal defenses of Tories, the single most important case was the 1784 *Rutgers v. Waddington*.

The case centered on the British Army's five-year occupation of New York City during the Revolution. While controlling the city, the Patriot Rutgers family fled, abandoning the family-owned brewery and property. The British controlled the brewery

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<sup>66</sup> The Trespass Act can be found in *New York Laws against Loyalists*, 122.

<sup>67</sup> Daniel J. Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664-1830* (Chapel Hill: University of North Carolina Press, 2005), 193.

<sup>68</sup> Hamilton to Gouverneur Morris, February 21, 1784, in Hamilton, *Papers*, 3: 512.

during their occupation of the city, authorizing Joshua Waddington to use the brewery as a warehouse from 1778 to 1780. When the English evacuated the city in 1783, the then-widowed Mrs. Elizabeth Rutgers sued for back rent. The Mayor's Court of New York City heard the case.

Hamilton's prepared briefs for the case as well as his plea before the Court reveal his line of thinking concerning the case.<sup>69</sup> But more importantly for this discussion they also serve as a valuable tool in detecting Hamilton's (and the Nationalists in general) perspective on the supremacy of the Treaty. In his briefs, Washington's former aide-de-camp flirted with the proposition that the Mayor's Court could strike down New York's Trespass Act. Hamilton believed the measure it violated Article Six of the Treaty by allowing for further prosecution or litigation of Loyalists. However tempting this may have been to Hamilton – and it appears that to some degree it was at least somewhat enticing – he retreated from this position. He did so in part because if the Mayor's Court followed his reasoning, the measure would have been declared void thereby invoking the idea of judicial review, something Hamilton believed the merits of his case could not fully support.<sup>70</sup>

What Hamilton did claim, however, fell completely in line with the arguments Nationalists across the Confederation.<sup>71</sup> He first pleaded before the Court that upholding

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<sup>69</sup> The briefs and pleading of the case can be found in Julius Goebel, ed., *The Law Practice of Alexander Hamilton: Documents and Commentary*, 3 vols. (New York: Columbia University Press, 1964), 1: 317-328, 338-392 [hereafter cited, Hamilton, *Legal Papers*].

<sup>70</sup> *Ibid.*, 338-339. Several historians claim that Hamilton eagerly used this argument in the case and viewed the potential use of judicial review as a powerful weapon against the excesses of the various state legislatures. While Hamilton may have held this view of judicial review – there really is no conclusive proof of this during his law career – it is clear from his briefs and pleading of *Rutgers* that he did not place heavy emphasis on judicial review for this particular case. The historian who best exemplifies this misunderstanding of Hamilton is Richard B. Morris, *Forging the Union*, 126-127.

the Treaty would bolster the international honor of the Confederation. In his prepared briefs, Hamilton insisted that the nature of the Union actually protected his Loyalist client. Waddington should not be forced to pay back rent, Hamilton argued, because the Treaty's amnesty clause protected against the New York legislature's violation of the Treaty with their anti-Loyalist measures. To do so would violate the sovereignty of the Confederation, where the Articles placed "full powers of War Peace and Treaty."<sup>72</sup> The authority to make treaties, he continued, implied the "power of making conditions" to end the conflict, including amnesty and other related provisions. Not only did the Confederation Congress possess this authority independent of the States, Hamilton asserted that if the Congress had no right to have amnesty clauses or the other Loyalists provisions in the Treaty, the Confederation amounted to "nothing." But Congress did, he continued, possess a right to include these provisions because while the States were internally sovereign, "externally," on the international stage, the country "exists only in the Union." Because a national sovereignty existed in Congress to conduct war and conclude peace, New York could not violate the Treaty's provisions, only "sovereign authority may violate Treaties."<sup>73</sup>

The Court's decision equivocated on the issue. While supporting Hamilton's argument that the Treaty protected Waddington from paying back rent due to the British

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<sup>71</sup> There is another line of argumentation that Hamilton employed in his arguments before the court that is important but tangential for this discussion. Along with the nature of the union and the treaty making powers of the Confederation Congress, Hamilton also relied heavily on the idea that the common law, which New York had assumed in its 1777 Constitution, included the Law of Nations. As Daniel Huselbosch has shown, this argument was a growing idea among Anglo-American legal philosophers in the mid to late eighteenth century. For example, William Blackstone, in his *Commentaries on the Laws of England*, noted that "the law of nations . . . is here adopted in it's full extent by the common law, and is held to be a part of the law of the land." William Blackstone, *Commentaries on the Laws of England*, 4 vols., *Of Public Wrongs*, vol. 2, (Oxford: The Clarendon Press, 1769; reprint, Chicago: The University of Chicago Press, 1979), 4: 67.

<sup>72</sup> Brief no. 3, *ibid.*, 349.

<sup>73</sup> *Ibid.*, 349-350, 356.



military's authorization, the decision, written by able lawyer and New York City mayor, James Duane, stopped there in its agreement with Hamilton. When the brewery fell under Waddington's civilian authority, the Mayor's Court ruled that the Mrs. Rutgers deserved back rent. Despite this balancing act, the Court supported a number of Hamilton's propositions about the nature of the American Union. The Court concurred with Waddington's defense council's opinion that the laws of nations most certainly applied to New York, because that state's constitution adopted English common law, which absorbed the Law of Nations. But the Court shied away from an outright overturning of the New York Trespass Act by again splitting the issue into two parts. "No dispute" read Duane's opinion, "hath arisen respecting the intrinsic sense of the Treaty" and viability of the Anti-Loyalist measure. In fact, "there is not a tittle in the treaty, to which the statue is repugnant." In this instance, the Court ruled that the Trespass Act did not violate any provision of the Treaty of Peace. In the second part of the ruling, the Court's opinion clearly agreed with the Nationalist argument on the Treaty. The Court acknowledged a "very great force" in the "foederal compact" which "bound" all the states into an independent nation. This nation, according to the Court, exercised a dual sovereignty with the States, leaving the internal business of the States to the individual bodies while "common and national affairs" became the province of "the delegates in Congress assembled." In dealings with foreign powers, moreover, it was only in this national capacity that the assemblage of States could be considered. "It seems," the opinion went, "that abroad they can only be known in their foederal capacity."<sup>74</sup> The result of this Union, the Mayor's Court concluded, was the application

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<sup>74</sup> *Rutgers v. Waddington*, in Hamilton, *Legal Papers*, 393-419, quote on 405-406.

of the law of nations to New York's anti-Loyalist measure. The similarity of this argument with the Nationalists should be obvious. As the previous passage clearly indicates, the Mayor's Court believed the Treaty superior to any State law or measure; the only difference here was that, in this case, at least, the Court believed that no such violation had occurred.

While the case resulted in minor victories for both sides (Waddington eventually settled out of court, agreeing to pay Rutgers £800), the public response to the case was anything but approval. One committee, led by Melecaton Smith, who would later lead the fight against the Constitution, published a scathing retort to the Mayor Court's decision. The committee charged the Mayor's Court with acting arbitrarily by attempting to supplant themselves above the elected legislature. Furthermore, Smith and the Committee lashed at the Court's attempt to bring the Law of Nations into the fold of New York's constitution. "Can a court of judicature," the report read, "consistently with our constitution and laws, adjudge contrary to the plain and obvious meaning of a statute? If these questions are answered in the negative," the Law of Nations was of "no more to the purpose than so many opinions drawn from the sages of the Six Nations."<sup>75</sup> While the Committee's remarks may be "an early expression of intellectual nativism," as one scholar has recently claimed, this critique, nonetheless, misses the subtle argument of state sovereignty.<sup>76</sup> One of the reasons the Committee damned the Mayor's Court rested in their belief that the Court, by relying more on the power of European thinkers and not the will of the people, subsumed the authority of the legislature and violated its sovereignty.

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<sup>75</sup> "An Address from the Committee Appointed at Mrs. Vandewater's" (New York: Kollock, 1784), 6-7.

<sup>76</sup> Husclebosch, *Constituting Empire*, 199-200.

While preparing for the *Rutgers* case, Hamilton decided to publicize his frustration with New York's apparent anti-Loyalist sentiment and disregard for the Treaty of Peace. In two separate "Letters" written under the pseudonym Phocion, Hamilton examined the entire issue of Loyalist reintegration. In fact, Hamilton's use of Phocion is of particular interest. Often in the Revolutionary and Early Republic period, essayists protected their identities through a pseudonym. In part, this was done to protect one's public reputation when arguing an unpopular point, but more often than not, these names – which tended to draw from the classical period – were used to make a point; a one word (or name) summation of the entire essay so to speak.<sup>77</sup> Phocion, Hamilton's choice name for arguing for the reintegration of Loyalists, was the Athenian General who called for the peaceful co-existence with the Macedonians. Thus, as Phocion, Hamilton was making it publicly known that the essays would argue for a peaceful co-existence between Patriots and former Loyalists. Furthermore, these two essays rank as the single most important discussion on the reintegration of Loyalists throughout the period as they touch upon practically every subject of reintegration; as such, they will be used extensively throughout this work. But for the purpose of this chapter, only Hamilton's theory about the Treaty and its relationship with reintegration will be examined.

A critical element of Hamilton's argument in both essays was the importance of the Treaty and the sovereign authority of the Confederation. Reaching a more complete and detailed examination than his legal briefs of the *Rutgers* case, Hamilton asked his

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<sup>77</sup> Joanne Freeman, *Affairs of Honor: National Politics in the New Republic* (New Haven: Yale University Press, 2001), 105-159; Mackubin Thomas Owens, "A Further Note on Certain of Hamilton's Pseudonyms: The 'Love of Fame' and the Use of Plutarch," *Journal of the Early Republic* 4 (Autumn 1984): 275-286; Eran Shalev, "Ancient Masks, American Fathers: Classical Pseudonyms during the American Revolution and Early Republic," *Journal of the Early Republic* 23 (Summer 2003): 151-172.

readers if “the act of confederation place[d] the exclusive right of war and peace” with the Congress? He continued to ask whether Congress had “not the sole power of making treaties with foreign nations? Are not these things among the first rights of sovereignty” which was clearly vested with the “general confederacy?” Even though this particular power required the slight abridgment of the states full independence and may have technically violated the notion of *imperium in imperio*, Hamilton informed his readers that this was not an unreasonable limit “assigned to . . . the union” as it was done for “the general safety and the fundamentals of the constitution?”<sup>78</sup>

What Hamilton claimed was that the authority of the States was not violated by the Treaty because the Articles of Confederation empowered Congress to conclude treaties. This, in fact, made the Confederation a sovereign power that possessed a collective power and not the internal authority of the States. But this did not mean that the States lacked influence regarding the Treaty. Hamilton clarified what he and other Nationalists posited from the first reception of the Treaty, namely that the Fifth Article was purely a recommendation and did not demand the States’ acquiescence.<sup>79</sup> Continuing the Nationalist perspective, Hamilton also insisted that the Sixth Article had to have State compliance. Here, the New Yorker devised a strong counter weight against the State Sovereignists. “[F]or it is impossible for Congress to do a single act which will not directly or indirectly affect the internal police of every state.” Therefore, Hamilton turned their argument on its head. Of course, the Treaty of Peace (or the Sixth Article at

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<sup>78</sup> Alexander Hamilton, “A Letter from Phocion to the Considerate Citizens of New York,” January 1-27, 1784, in Hamilton, *Papers*, 3: 483-497, quote on 489.

<sup>79</sup> Hamilton, “Second Letter from Phocion,” April, 1784 in *ibid.*, 538.

least) interfered with the internal policy of the States because practically anything the Congress did interfered in some form with the States internal workings.<sup>80</sup>

Reasoned and well conceived, the Phocion essays were the culminating efforts of the Nationalists in the immediate aftermath of the Treaty's reception. Hamilton's first letter met a serious challenge from Isaac Ledyard's "Mentor essay" in which the author responded to Hamilton's position by contending that Loyalists issue fell only to the States. Ledyard, a noted New York City physician, agreed with Hamilton on the necessity of following the Treaty, but differed on the interpretation of document. Mentor asserted that the Treaty could not "debar" New York (and the other States too), from passing anti-Loyalist measures "that may be salutary to the government and advantageous, though in their consequence they may operate against the interest of the subjects of England."<sup>81</sup> Ledyard based his assertion on the fact that the laws did not operate against those Loyalists who chose to become New Yorkers, but rather those Tories who remained in the Empire. In the end, New York, like practically every other State in the Confederation, did not immediately repeal laws that conflicted with their Treaty.

### **The Treaty in the Courts, 1785-1790**

Hamilton's courtroom actions, especially the *Waddington* case, were not the only judicial cases where the peace Treaty and federalism played a critical role regarding the Loyalists. Throughout the 1780s – and well into the nineteenth century, really – courts from across the nation heard and ruled on Loyalist cases that bore directly upon returned

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<sup>80</sup> "First Letter of Phocion," *ibid.*, 490-491.

<sup>81</sup> Isaac Ledyard, "Mentor's Reply to Phocion's Letter; with some Observations on Trade" (New York: Kollack, 1784), 13.

Tories, the Treaty, and federalism.<sup>82</sup> Two of the more important of these cases were the 1788 case of *Camp v. Lockwood*, and the 1790 case of *Dulany v. Wells*<sup>83</sup>

Camp's attorney, Jared Ingersoll, Jr., the Patriot son of the famous Connecticut Tory, asserted that the Treaty of Peace, particularly Article Four, permitted his client to seek the payment of his debt. Lockwood's attorney countered by resting his defense on two points: that the Philadelphia County court had no jurisdiction to hear the case, and that the debt, through the confiscation of Camp's property, was settled. The critical part of Lockwood's defense was the first point, namely, that the Court had no jurisdiction to hear the case. If the Court agreed to Lockwood's proposition, only Connecticut could decide the issue. The implications of State sovereignty and responsibility for the Treaty's interpretation are clear: it was an issue for the individual states alone and not for the Confederation or any sister state to decide.

Before the Court rendered its decision, Ingersoll, speaking for Camp, responded to the question of jurisdiction. Following the Nationalist argument, he asserted that "it is true, that these States are said to be sovereign and independent, but they are evidently bound by a link which must be taken into view," particularly that the Confederation Congress was not "an assemblage of ambassadors, but a sovereign power, and capable of

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<sup>82</sup> A great reference and examination of these cases can be found in John Basset Moore, ed., *International Adjudications: Ancient and Modern*, 6 vols. *Arbitration of the Claims for Compensation for Losses and Damages Resulting from Lawful Impediment of the Recovery of Pre-War Debts: Mixed Commission under Article VI of the Treaty Between Great Britain and the United States of November 19, 1794*, vol. 3 (New York: Oxford University Press, 1931), *passim* [hereafter cited: Moore, *Arbitration of Claims*]. By the time this case reached its ultimate conclusion in 1795, the Federal Constitution of 1787 had been adopted and the 1794 Treaty between the United States and Great Britain, commonly known as the Jay Treaty, had been ratified. While these two critically important developments affected the outcome of this case, I am not going to detail their significance. Rather, the point of the case for this chapter is to further demonstrate the importance of the Treaty to the issue of post-war Loyalism.

<sup>83</sup> *Camp v. Lockwood* can be found in James Alexander Dallas, ed. *Reports of the Cases Ruled and Adjudged in the Courts of Pennsylvania before and since the Revolution*, 4 vols. (Philadelphia: T. Bradford, 1790), 1: 393-404; Moore, *Arbitration of Claims*, 172-173.

suing like a corporation, without any express statue to enable them.”<sup>84</sup> Thus to Ingersoll, the Confederation was far more than just a loose gathering of states; it was, in and of itself, a nation-state. The condition of the Confederation, Ingersoll stressed, allowed the Court jurisdiction in the case because the nature of the State’s relationship meant that what applied to one, applied to all.

The Court’s judgment, written by its president, Edward Shippen, was more than just a judicial decision on the case; it was an examination of the very nature of the American Union and how it affected the interpretation of Treaty of Peace. What is more, Shippen’s opinion epitomized the Nationalist interpretation perhaps better than any other argument, save for Hamilton’s *Rutgers* briefs and “Phocion” essays. Answering the question of the jurisdiction of his court, Shippen declared the case was not one brought by the State of Connecticut or anyone working within its laws to recover a debt. Rather it was a question of whether the debt was actually paid through the confiscation of the property and “whether, under the peculiar circumstances of our relative situation with regard to each other, the Courts of this State can take notice of such confiscation and vesting, so as to preclude the Plaintiff from recovering here, a debt due to him there.”<sup>85</sup> This may appear as a legal hairsplitting, but it was not; the answer to this question permitted the court to explain the relationship of the States and the enforcement of the Treaty.

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<sup>84</sup> *Camp v. Lockwood*, 398. The reference to “an assemblage of ambassadors” is that made by John Adams in his *Defense of the Constitutions* cited in the last chapter (n.18). In the printed report of *Camp v. Lockwood*, the reporter writes that Ingersoll refers to Mr. Adams by name and citing his interpretative mistake.

<sup>85</sup> *Ibid.*, 401.

Shippen replied to the question of jurisdiction by examining the recent history of the Union. He acknowledged that the unification of the colonies successfully led the colonial resistance to England. “The first body that exercised any thing like a sovereign authority,” he wrote, “was the Congress of the then United Colonies.” Even with the formation of the States and the official break from Great Britain, the “general power” remained with Congress, even if that power was “undefined” while the States retained their sovereignty under the Articles of Confederation. Even this sovereignty, he remarked, was loaded with caveats. “Though free and independent,” the States were nonetheless “not to be such distinct sovereignties as have no relation to each other but by treaties and alliances, but are bound together by common interest, and are jointly represented and directed to national purposes.” Yet, while Shippen acknowledged the States’ ability to handle their own internal business, he believed that the Congressional recommendations of the States “had generally the force of laws.” Thus, while Connecticut passed its own confiscation law, which directly affected Camp, that measure came about only after a Congressional recommendation. Even Connecticut’s legislation applied to people who were enemies of the United States and not just itself. The application to enemies of the entire country and not just the single state, Shippen continued, allowed his court to hear the case. “The offense,” he wrote, “which incurred the forfeiture, was not an offense against the State of Connecticut alone, but against all the State in the union: And the act, which directed the forfeiture, was made in consequence of the recommendation of Congress . . . and was a case within the general powers vested in them.” Because of the supposedly general nature of the confiscation – being more a response to Congress’ recommendation than Connecticut’s original policy –



“our courts must, therefore, necessarily take notice of the confiscations made in a sister State on these grounds.”<sup>86</sup> Simply put Shippen contended, in essence, that since the States were bound by a union of common interest, with Congress recommending the confiscation of Loyalist property occurring because it was in the common interest of the States, Courts from across the nation could render decisions regarding confiscation.

How Shippen’s nationalist origins of the Union argument affected the Treaty of Peace appeared at first glance to be fairly straightforward, but in reality it was contradictory. The Court asserted that Article Four of the Treaty did not apply to Camp because the court considered him a citizen of Connecticut and not a British subject. This, in and of itself, did not conflict with Shippen’s argument; yet, as the Court acknowledged, the only other remedy for Camp would be if Connecticut enacted measures following the recommendation stated in the fifth article of the treaty, which it had not (and never did). Here was the contradiction in Shippen’s argument: he claimed that earlier Congressional recommendations, while not laws, “had generally the force of laws.” Congress did recommend the restitution of Tory property and debts but Connecticut did not follow suit (nor did any other State). Why did Connecticut refuse to follow this Congressional recommendation when it had clearly abided by the one to confiscate Loyalist property? The answer was that Connecticut simply did not have to. Congressional recommendations were not laws and Connecticut, because it was a sovereign State, could determine whether it would conform to the recommendation. It is difficult to imagine Shippen not considering this question and its answer when trying to lay out his opinion, yet he did not address this problem, stating only that Connecticut had

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<sup>86</sup> *Ibid*, 403.

not enacted such a law. Had Shippen explored this topic to its logical conclusion, it is not inconceivable that he may have reached a different conclusion as to the nature of the Union and the question of jurisdiction.

The 1790 case of *Dulany v. Wells*, the *Camp* case, concentrated on a Loyalist's attempt to recover outstanding debts. Although the final judicial decision came in 1795, *Dulany v. Wells* originated in Maryland soon after the conclusion of the Revolution and reception of the Treaty and centered on the recovery of a debt contracted on April 1, 1775, eleven days before Lexington and Concord. Wells believed his debt to have been extinguished in accordance to a Maryland war-time legislative measure allowing debts to be paid into the State's treasury.<sup>87</sup> Originally the Maryland General Court ruled against Wells and ordered him to pay the debt, resulting in an appeal to the Maryland Court of Appeals. While a cornerstone of the plaintiff's argument focused on the issue of citizenship, another important element was the Treaty of Peace, or rather, if the Treaty forced the repayment of the debt. Dulany's attorney, William Cooke, held that the fourth article of the Treaty in fact forced Wells into such a repayment. The particular measure passed by Maryland that allowed debts to be paid into the treasury did not stipulate British debts. Since the fourth article of the Treaty of Peace, "does not recommend" the recovery of bona fide debts but rather "the provision is express, as these [i.e. Loyalist debts] were not confiscated and seized" thereby requiring the payment of the debt.<sup>88</sup> Cooke summed up his reliance on the Treaty's protection to recover his client's debt by

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<sup>87</sup> *Laws of Maryland Made and Passed at a Session of the Assembly*, October Session (Annapolis: Frederick Green, 1780), chs. 5 and 40.

<sup>88</sup> While the *Dulany v. Wells* is ably summed in Moore, *International Adjudications*, 180-192, the text of the case is in Thomas Harris, Jr. and John McHenry, eds., *Maryland Reports being a Series of the Most Important Laws Cases*, 4 vols. (New York and Annapolis: Wiley, 1809-1818), 3: 20-84, quote on 32 [hereafter cited, *Dulany v. Wells*].

asking the court if it was not “the intention of the Treaty to provide for the payment of debts over which the state had exercised their power, when it appeared that as to debts, of all description, the treaty speaks positively; but as to those subjects over which the state had exercised their power of confiscation, it only recommends a revision of their laws, and restitution[?]”<sup>89</sup> In other words, because Maryland did not confiscate the debt during the war, the State could not prevent its recovery because Article Four forced the action. Cooke concluded his argument by adding that “as this Treaty is the supreme law,” because Maryland declared it so in 1787, it invariably, “by our own consent, revived the remedy” of collecting the debt.<sup>90</sup>

While Cooke claimed the supremacy of the Treaty to Maryland’s law about treasury payments, he rested his contention for the Treaty’s supremacy only when the individual state of Maryland had consented to the Treaty. Thus, unlike Hamilton who believed the Treaty supreme because the Confederation had ratified it, Cooke asserted that the individual states had to consent to the Treaty’s supremacy. In essence, Cooke’s argument straddled the understandings of both the Nationalists and State Sovereignists.

In this argument of State consent, Wells’ defense attorney, Luther Martin, would not disagree. Yet, he took serious issue with the plaintiff’s contention over the supremacy of the Treaty over Maryland’s legislation. Sounding much like the Anti-Federalist he was, Martin asserted that the Treaty could not repeal laws already in existence. His remarks, while lengthy, are worth quoting in full as they aptly summarize the State Sovereignists’ argument:

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<sup>89</sup> *Ibid.*

<sup>90</sup> In 1787, Maryland enacted legislation making the Treaty of Peace the supreme law of the land. *Laws of Maryland Made and Passed at a Session of the Assembly*, April Session (Annapolis: Frederick Green, 1787), ch. 25.

Can, then, the treaty operate to destroy the acts which were done before its existence; to take away the right of individuals acquired under our laws, and which vested in them during the continuance of the laws? Had congress such power? I think, if necessary, it might be questioned. How is the treaty to operate for this purpose? It is said, either in its own nature, or in consequence of the law of our state, declaring it to be the supreme law of the land, it operates as a repeal of the former act. Admit it to be so; the repeal of a law cannot destroy acts done and rights acquired under the law during its existence, and before its repeal; and though it is declared to be the supreme law, still, as far as that declaration goes, it is but a law; nor doth that declaration cause it to be the supreme law, or any law, before it existed as a treaty. The repeal of a law prevents rights being afterward acquired under the law repealed, but doth not annul those acquired previously. The contrary construction would be replete with iniquity and injustice.

Congress had no rightful power to infringe or annul any law of any state in the union, or to interfere with the right of any individual acquired under these laws. The most they could do rightfully, was to stipulate against acts being done by the state after the ratification of the treaty, not would this be binding on the states in any other manner than as in ratifying the treaty they would accede to the terms; and if they refused they would be deprived of the benefit of the treaty, and would be guilty of a breach of the treaty, by doing in the future the acts by the treaty prohibited. But every might, at a moment's view of the question, perceive an infinite difference between stipulating against future acts being done, (which acts being future, are in the power of the states not to do, and which stipulation still doth not restrain them, unless they think peace ought, on those terms, be accepted,) and destroying already done, and taking away rights of individuals already vested.<sup>91</sup>

Martin posited that the laws of the States, and Maryland in particular, were the internal business of the states. Congress, then, could not interfere and force their repeal. All the Treaty stopped by article four, he concluded, were future acts of confiscation or measures against debt recovery. Since Maryland had already allowed for a method for debt payments, and Wells sunk his debt, the Treaty could repeal neither the legislative measure nor Wells' action.

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<sup>91</sup> *Dulany v. Wells*, 65-66.

The Maryland Court of Appeals agreed with Luther's construction of the measure and did not force Wells to pay the debt.<sup>92</sup> But *Dulany v. Wells* only touched on the interpretation of the Treaty and its supremacy to State; it said nothing about the nature of the American union and how it affected the Loyalists. That issue became a critical topic of the 1788 case of *Camp v. Lockwood*.

These cases continued the argument over how federalism affected the understanding the Treaty of Peace and, subsequently, the return of the Loyalists well into the 1780s and beyond. Even had these cases not occurred, federalism still played a vital interpretive role for the Treaty well into the later years of the Confederation and the first years of the Constitutional era if only because of the numerous Anglo-American negotiations.<sup>93</sup> From 1783 to 1786, Congress, moreover, made repeated pleas to the States to conform to the Treaty. These appeals peaked in 1786 when Jay, who by this point had become the Secretary of Foreign Affairs, issued a report detailing the continuing legislative measures that violated the Treaty.<sup>94</sup> Those efforts, however, like

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<sup>92</sup> The Maryland Court of Appeals reached a similar conclusion in the case of *Court v. Vanbibber*, Harris and McHenry, *Maryland Reports*, 140. Ultimately, the United States Supreme Court overturned the Maryland Court of Appeals. Similarly, George Wythe, Chancellor of the Virginia High Court of Chancery, ruled in the 1793 case of *Page v. Pendleton* that the Treaty superceded the Virginia that permitted a debt to be discharged through paper money. For that case see George Wythe, *Decisions of Cases in Virginia, by the High Court of Chancery, with Remarks upon Decrees by the Court of Appeals, Reversing Some of Those Decisions* (Richmond: Thomas Nelson, 1795), 127-132.

<sup>93</sup> The two main episodes were the 1785-1786 Adams-Carmarthen discussions between American minister, John Adams and British Secretary, Carmarthen. For this exchange see *Journals of the Continental Congress*, 31: 781-874; Tansman, "Treaty and the Tories," 169-187. The other incident occurred in 1792 between Secretary of State, Thomas Jefferson, and the British minister, George Hammond. For their dialogue see Jefferson, *Papers*, 23: 196-220, 352-353, 379-380, 551-613. For an excellent secondary work covering the Jefferson-Hammond discussion see Stanley Elkins and Eric McKittrick, *The Age of Federalism: The Early American Republic, 1788-1800* (New York: Oxford University Press, 1993), 244-256; These two diplomatic moments are not included in this particular chapter because while federalism was a critical factor in their discussions, particularly for the Americans, these diplomatic exchanges had little to do with returning or already returned Loyalists and, as such, are not detailed here.

<sup>94</sup> Jay's issued his report in response to the discussions over debt recovery by Adams, the American ambassador to England and Carmarthen, England's representative. His report can be found in *Journals of the Continental Congress*, 31: 781-874. Also see Tansman, "Treaty and the Tories," 188-210.

so much else the Congress did in the 1780s, fell on deaf ears. Beginning in 1786, the States, one by one, finally began to officially repeal their laws that conflicted with the Treaty and allow Loyalists to return or remain in America.<sup>95</sup>

Yet, the rescinding of these measures was not a victory for the Nationalist argument over the nature of the American Union. That battle had already been lost to those who advocated the sovereignty of the States; rather the repeal of those laws resulted from other factors including a growing respect for Loyalists' rights, a shift in jurisprudence and popular sovereignty, and the changing status of Tories from traitors to citizens, all of which will be the focus of the next several chapters. The battle between the Nationalists and State Sovereignists over the Treaty throughout 1783 and 1784, however, initiated a conflict between Americans that would rage over the reintegrating the Loyalists. While the process of accepting former Loyalists as members of the society took several years and many steps, one of the key issues of Tory amalgamation centered on enforcing the Treaty and its effect upon Loyalist assimilation. Because Patriots understood the thirteen States as being thirteen separate nations with full rights of sovereign nations--the only exception being the authority those states granted the Confederation Congress via the Articles of Confederation--the responsibility of the treatment of the Loyalists fell to the individual states. This nature of Union made the enforcement of Articles Four and Six of the Treaty nearly impossible, even with the express power of the Continental Congress to conduct war and peace. The result of these

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<sup>95</sup> The order in which the States officially repealed all laws repugnant to the treaty: New Hampshire, September 15, 1786; Massachusetts, April 30, 1786; Connecticut, May 10, 1787; Maryland, May 15, 1787; Rhode Island, September 1787; Virginia, December 12, 1787; North Carolina, December 22, 1787; Delaware, February 2, 1788; New York, February 22, 1788; Pennsylvania, March 3, 1788; New Jersey, 1788; South Carolina and Georgia, no information available. Dates taken from Maas, "Return of Massachusetts Loyalists," 512 n 79.

debates and the inability of Congress to fully enforce the Treaty ensured that the rest of the process of Tory assimilation remained a state by state development.

## Chapter 5

### Republicanism, Virtue, and Individual Rights: The Ideological Struggle to Reintegrate the Loyalists, 1776-1785

Securing and debating the Treaty of Peace only initiated the issue of returning Loyalists; it certainly did not settle the issue. With the Treaty in place – or rather at least received by the Confederation Congress and the States – and the initial trickle of Loyalists came the first serious questions of what to do with the returnees: should they be allowed to return, should they be forced to remain in exile, or, if they had not yet left, should they be forced to leave? That debate over whether to accept or resist the Loyalists involved the first serious discussion of republican ideals since the advent of the Revolution. Often concerned with the other political conflicts of the 1780s, historians have overlooked not only this debate but also that it took a noticeably ideological bent that centered on the viability of republicanism.<sup>1</sup> At the heart of the problem was how a nation that accepted republican ideas, especially the necessity of virtue, could accept as equals and citizens those who had openly rejected republican government in favor of empire and monarchy? Attempting to answer this question was not an easy task; in fact, it was a battle of ideas outmatched only by the imperial crisis of the 1760s and 1770s and the ratification struggle of just a few years later. When the debate ended in the mid 1780s, those favoring reintegrating the Loyalists emerged victorious. In order to secure the return of the Loyalists, however, American defenders of reintegration altered the traditional concept of republicanism, with its stress on virtue and common weal, by

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<sup>1</sup> Two good examples of this are Richard B. Morris, *The Forging the Union, 1781-1789*, New American Nation Series, eds. Henry Steele Commager and Richard B. Morris (New York: HarperCollins, 1988) and John Fiske, *The Critical Period in American History, 1783-1789* (Boston: Houghton Mifflin, 1897).



emphasizing the idea and supremacy of private, individual rights. To place this development within the historiography of early America, it amounted to a triumph of “liberalism” over “republicanism.” The ideological debate over the returning Loyalists, however, was not a clear-cut battle between competing ideologies. Rather, what occurred was that those advocating the return of the Loyalists blended the ideas of republicanism and liberalism to form (and win) their argument. This victory by pro-reintegration advocates had serious ramifications for assimilating Loyalists. If Americans could begin to appreciate and respect the rights of former Tories, accepting them as equal members of society could be accomplished with greater ease.

Mid- and late-eighteenth century Americans were guided by a set of ideas commonly labeled republicanism.<sup>2</sup> The works of Bernard Bailyn, Gordon Wood, J.G.A. Pocock, and others revealed the root of these ideas as being derived from a variety of sources, the most important of which come from seventeenth and eighteenth centuries’ England. These English thinkers and their ideas imparted to eighteenth century

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<sup>2</sup> Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge: Harvard University Press, 1967), 55-93; Gordon Wood, *Creation of the American Republic, 1776-1787* (Chapel Hill: University of North Carolina Press, 1969), 18-28; J.G.A. Pocock, *Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton: Princeton University Press, 1975); Caroline Robbins, *The Eighteenth-Century Commonwealthman: Studies in the Transmission, Development, and Circumstances of English Liberal Thought from the Restoration of Charles II until the War with the Thirteen Colonies* (Cambridge: Harvard University Press, 1959); Lance Banning, *The Jeffersonian Persuasion: The Evolution of a Party Ideology* (Ithaca: Cornell University Press, 1978), 42-70; John Phillip Reid, *The Concept of Liberty in the Age of the American Revolution* (Chicago: University of Chicago Press, 1988), *passim*; Lee Ward, *The Politics of Liberty in England and Revolutionary America* (Cambridge: Cambridge University Press, 2004); and Alan Craig Houston, *Algernon Sidney and the Republican Heritage in England and America* (Princeton: Princeton University Press, 1991). See also Jack P. Greene, “The Reappraisal of the American Revolution in Recent Historical Literature” in Jack Greene, ed. *Interpreting Early America: Historiographical Essays* (Charlottesville: University Press of Virginia, 1996), 367-440; Alan Gibson, *Interpreting the Founding: A Guide to the Enduring Debates over the Origins and Foundations of the American Republic* (Lawrence: University Press of Kansas, 2006); Robert Shalhope, “Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in Early American Historiography,” *William and Mary Quarterly* 29 (1972): 49-80 and “Republicanism and Early American Historiography,” *William and Mary Quarterly* 39 (1982): 334-356; and Daniel Rogers, “Republicanism: The Career of a Concept,” *Journal of American History* 79 (June 1992): 11-38.

Americans a set of beliefs that not only shaped colonial resistance to England and the establishment of independent states but also the type of society needed to maintain those states. These ideas, however, were not clearly demarcated. Rather, they flowed like tributaries into a vibrant and strong river of thought that persisted in England for roughly a century and drove a revolution in America. Yet, for the present chapter it is necessary to distinguish between these three critical strands of republican thought because, as will be shown, American criticism of Loyalists followed these three paths – sometimes embracing all these ideas at once while other times endorsing only one or two.

Among the more important ideas of republicanism there were three distinct themes: the struggle between liberty and power; the fear of ministerial influence; and, most important of all, virtue. Republican ideology held that for a republic to survive, the citizenry must possess virtue. This virtue entailed a variety of things including “frugality, industry, temperance, and simplicity – the rustic traits of the yeoman,” moderation, and the sacrifice of individual interest for the public good “were the stuff that made society strong.”<sup>3</sup> Should the citizenry forsake any one of these, however, the republic was in immediate danger of slouching towards tyranny or licentiousness and, consequently, the end of the republic. Yet, the longer the people maintained their virtue, the more secure a republic would be. Although the ultimate goal of this virtue was for the support and safeguarding of the public good, a healthy body politic required individuals in concert.<sup>4</sup>

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<sup>3</sup> Wood, *Creation of the American Republic*, 52.

<sup>4</sup> Pocock, *Machiavellian Moment*, especially 462-552; Pocock, “Virtue and Commerce in the Eighteenth Century,” *Journal of Interdisciplinary History* 3 (Aug. 1972): 119-134; Lance Banning, “Some Second Thoughts on Virtue and the Course of Revolutionary Thinking,” in Terrance Ball and J.G.A. Pocock, eds. *Conceptual Change and the Constitution* (Lawrence: University Press of Kansas, 1988), 194-212; Wood, *Creation of the American Republic*, 65-70, 91-118, 410-425; and Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (Lawrence: University Press of Kansas, 1985), 70-71. On the religious aspect of virtue, see Nathan Hatch, *The Sacred Cause of Liberty: Republican Thought and the Millennium in Revolution New England* (New Haven: Yale University Press, 1976) and Richard

To be sure, some scholars have questioned the degree to which republican beliefs guided the Revolution, arguing instead that John Locke and his emphasis of individual rights and market economy were more important to the Founders. This argument spawned a heated historiographical debate on which was more prevalent, republicanism or Lockean liberalism?<sup>5</sup> Historian Lance Banning, however, offered an alternative: the American founding was actually a blend of both republican and liberal ideas. Banning extended this blended ideology to the idea of virtue, arguing that by 1787, the idea of virtue had lost its Revolutionary definition and was, instead, “a vibrant and vigilant defense of one’s own liberty and interest.”<sup>6</sup>

Before examining the ideological dimensions of anti-Tory sentiment, it is necessary to pause here to review one important argument on how republicanism may have affected the reintegration of the Loyalists. Loyalist scholar Robert M. Calhoon has

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Vetterli, *In Search of the Republic: Public Virtue and the Roots of American Government*, 2<sup>nd</sup> rev. ed. (New York: Rowman and Littlefield, 2001). Also see Baron de Montesquieu, *The Spirit of the Laws*, Anne M. Cohler, et al., eds. (Cambridge: Cambridge University Press, 2002), Book 3, Chapter 6; David W. Carrithers, Michael A. Mosher, and Paul A. Rahe, eds., *Montesquieu’s Science of Politics: Essays on The Spirit of the Laws* (New York: Rowman and Littlefield, 2001). Thomas L. Pangle has argued for a more liberal understanding of Montesquieu’s political thought. Thomas L. Pangle, *Montesquieu’s Philosophy of Liberalism: A Commentary on The Spirit of the Laws* (Chicago: The University of Chicago Press, 1973).<sup>5</sup> The principal advocates of this “Lockean” approach are Joyce Appleby, *Capitalism and a New Social Order: The Republican Vision of the 1790s* (New York: New York University Press, 1984), Appleby, *Liberalism and Republicanism in the Historical Imagination* (Cambridge: Harvard University Press, 1992); Isaac Kramnick, *Bolingbroke and His Circle: The Politics of Nostalgia in the Age of Walpole* (Cambridge: Harvard University Press, 1968); Kramnick, “Republican Revisionism Revisited,” *American Historical Review* 87 (June 1982): 629-664; John Patrick Diggins, *The Lost Soul of American Politics: Virtue, Self-Interest, and the Foundations of Liberalism* (New York: HarperCollins, 1984); James T. Kloppenberg, “The Virtues of Liberalism: Christianity, Republicanism, and Ethics in Early American Political Discourse,” *Journal of American History* 74 (June 1987): 9-33; and Kloppenberg, “Virtue” in Jack P. Greene and J. R. Pole, eds., *The Blackwell Encyclopedia of the American Revolution*, (New York: Blackwell Publishers, 1994), 688-694. For a somewhat different approach see Michael Zuckert, *Natural Rights and the New Republicanism* (Princeton: Princeton University Press, 1998) and, *The Natural Rights Republic: Studies in the Formation of the American Political Tradition* (South Bend: Notre Dame University Press, 1996).

<sup>6</sup> Lance Banning, “Jeffersonian Ideology Revisited: Liberal and Classical Ideas in the New American Republic,” *William and Mary Quarterly* 43 (Jan. 1986): 3-19; Banning, “The Republican Interpretation: Retrospect and Prospect,” in *Republican Synthesis Revisited: Essays in Honor of George Athan Billias*, Milton Klein, et al, eds. (Worcester: American Antiquarian Society, 1992), 91-117; and Banning, “Second Thoughts on Virtue,” 199.

suggested that moral republicanism – the secular republicanism that upheld and celebrated the private morality of citizens, such as temperance and simplicity – may play a vital role in reintegration. It is an argument that carries some weight because it would appear at first glance that the moral aspect of the republican argument would be a leading ideological factor of letting Loyalists back into the country.<sup>7</sup> Yet, after the War when some Americans began calling for the peaceful return of Loyalists, the republicanism most often blended with Lockean liberalism was not private in nature as Calhoun contends; it was, instead, the secular republicanism of the community over the individual. The one possible exception to this was Benjamin Rush, whose argument in favor of leniency for the Loyalists was couched in moral republicanism and Christianity.

Patriot hatred for Loyalists was based on more than simply political or personal animus, although one cannot dismiss these as motivations. A good deal of this animosity was ideologically driven. From the enactment of the 1774 Continental Association until long after war's end, Patriots attacked Tories on a number of ideological fronts, including the liberty and power dichotomy, fear of the corrupting influence of the Loyalist presence, and, most importantly, virtue. The core ideas behind each of these attacks were near, if not, wholly republican in nature. This republicanism was, moreover, secular with little to no trace of the moral republicanism found in other Revolutionary arguments. Furthermore, little concern existed for individual rights; if anything, as the next chapter shows, the various anti-Loyalist legislations demonstrated a strong lack of concern

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<sup>7</sup> Robert M. Calhoun, "The Reintegration of the Loyalists and Disaffected," in Jack P. Greene, *The American Revolution, Its Character and Limits* (New York: New York University Press, 1987) 51-74. The essay was reprinted in Calhoun, ed., *The Loyalists Perception*, 195-219. It should be noted that Calhoun does not make an explicit argument for a link between moral republicanism and reintegration. Instead, he only offers it as a possibility that requires further research. This chapter is an attempt to flesh out this argument.

among Patriots for Loyalist's rights. While these republican ideas dominated discussion on the Loyalists during the war, a noticeable shifting in ideology occurred soon afterwards. Suddenly, several widely read publications appeared defending remaining and returning Loyalists from the harshness of anti-loyalist laws and sentiments. The arguments in defense of these Loyalists proved more concerned with individual rights than any previous argument regarding Loyalists.

Among the more common arguments Patriots leveled against Loyalists during the war years was that they supported the tyranny of England and were co-conspirators in the destruction of colonial liberty. Failure to sign the Association, participate in non-importation, or joining the British Army or supporting them in any way, was cause for suppression and hatred.<sup>8</sup> As one Massachusetts committee report stated, a group of men were actively attempting "to reduce all *America* to the most abject state of slavery."<sup>9</sup> The actions from Parliament were bad enough, but to have vipers in the den was too much for Patriot's to handle. To Americans, Loyalists were just as determined as England to drive a stake through the heart of liberty. A Worcester, Massachusetts, committee noted that supporters of England were enemies "to the rights; and privileges of this Country, and has been aiding or abetting to the cursed plans of a tyrannical ruler and an abandoned Ministry."<sup>10</sup> In South Carolina, where Revolutionary fervor was not as initially strong as in New England, Provincial Governor William Drayton issued a proclamation against

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<sup>8</sup> The legalities of these crimes will be discussed in the next chapter.

<sup>9</sup> "Report of Committee Appointed to Consider what Should be done with the Estates of Persons Unfriendly to the Country," May 5, 1775, Peter Force, ed. *American Archives: Document Relating to the American Revolution*, Sixth Series (Washington D.C., Government Printing Office 1837-1853), Series 4, vol. 2: 817.

<sup>10</sup> Worcester, Massachusetts "Enemies to the Rights and Liberties of the Country, who have aided the plans of a tyrannical ruler and an abandoned Ministry, disarmed at Worcester, Massachusetts, and ordered not to leave the Town or meet together," May 24, 1775,. Force, *American Archives*, Series 4, vol.2, 700.

Loyalist Moses Kirkland, marking him and all who followed him threats to the security and liberty of South Carolina.<sup>11</sup> While in Rhode Island, a place known for its religious toleration, the capital city of Providence passed a resolution, eight months before the shots at Lexington and Concord, refusing to accept “any person or persons of whatever town, place, or city, within the *British Dominions*, whose principles and practices being inimical to the liberties of our country and its happy Constitution, have rendered or shall render them obnoxious to the inhabitants of such place or places from which they may emigrate.”<sup>12</sup>

To Patriots, liberty, ever fragile and threatened, was clearly under attack not just by MPs in England but from home-grown Americans. It was this fear of decaying liberty and political enslavement – a fear that was vital aspect of republican ideology – that drove much of the anti-Loyalist sentiment. A good deal of this fear, in retrospect, was unfounded, but the perception of a Loyalist threat was more than real, and with Loyalists supporting Parliament and King it was more than merely a perception. Guided as they were by republican ideas on the fragility of liberty, it really should come as no wonder that Patriots were suspicious of Loyalists.

Related to the Patriots’ fear of Loyalist tyranny was the American explanation as to why Tories chose the arbitrariness of Parliament and King over American liberty. The answer was simple: Loyalists were placemen – owing their political power and

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<sup>11</sup> William Drayton, “A Proclamation to the People of Ninety-Six District,” Force, ed. *American Archives* Series 4, vol. 3, 456. David Ramsay, *The History of the Revolution in South Carolina: From a British Province to an Independent State*, 2 vols. (Trenton, S.C.: Isaac Collins, 1785) 1: 155. The episode is mentioned in Robert S. Lambert, *South Carolina Loyalists in the American Revolution* (Columbia: University of South Carolina Press, 1987), 39.

<sup>12</sup> “A Town Meeting in Providence, Rhode Island . . .” August 30, 1774, in Force, ed. *American Archives*, Series 4, vol. 1: 746. Also see Robert M. Calhoun, “John Witherspoon and Loyalist Recantation” in Robert M. Calhoun, ed. *The Loyalist Perceptions and Other Essays* (Columbia: University of South Carolina Press, 1989), 179-194.

prominence to the corruption of the modern English state. Modern historians have long since demonstrated how the greater number of Loyalists was far from prominent or politically powerful.<sup>13</sup> Nonetheless, a major part of the American ideological reaction to Tories stemmed from this very argument. As Joseph Reed told Josiah Quincy, “the powerful rhetorick of corruption, in which the present Administration is too well versed, has not been used in vain.”<sup>14</sup> That great critic of character, John Adams, was especially critical of Loyalists. His condemnation of the last royal governor of Massachusetts, Thomas Hutchison, is fairly well known.<sup>15</sup> It is less commonly noticed that Adams’s remarks demonstrated his adherence to republican beliefs. He recorded in his diary that Hutchinson and other royal officials in Massachusetts were attempting to “make Proselytes” who would accept their absolutists beliefs. Adams believed that Hutchinson and the other officials, especially Peter Oliver, were deceiving themselves into accepting English tyranny because of their “ambition and avarice” – enemies of virtue.<sup>16</sup> Were it not for this ambition and avarice, Adams implied privately that Hutchison and Oliver may have been on the side of liberty.

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<sup>13</sup> During the Revolution and first half of the nineteenth century, the social makeup of Loyalists was understood to be the rich and powerful. But Lorenzo Sabine’s pioneering work and the work of modern historians has found this stereotype to be just that, a stereotype. While it cannot be denied that a most of the royal government officials owed their position to patrons back in England and that most, if not all, of these officials were Loyalists during the Revolution, the majority of Loyalists came from social strata several steps removed from the socio-political elites of the colonies. See Lorenzo Sabine, *The American Loyalists or Biographical Sketches of Adherents to the British Crown in the War of the Revolution* (Boston: C. C. Little and J. Brown, 1847); William E. Nelson, *The American Tory* (Boston: Beacon Press, 1961), 85-115.

<sup>14</sup> Joseph Reed to Josiah Quincy, November 6, 1774, found in Force, ed. *American Archives*, 1: 963.

<sup>15</sup> Bernard Bailyn, *The Faces of Revolution: Personality and Themes in the Struggle for American Independence* (New York: Vintage, 1992), 42-65.

<sup>16</sup> John Adams, *The Diary and Autobiography of John Adams*, L. H. Butterfield, et al, eds., 4 vols. (Cambridge: Belknap Press of Harvard University, 1961), 2; Douglass Adair and John A. Schultz, eds. *Peter Oliver: Origin and Progress of the American Rebellion: A Tory View*, (Stanford: Stanford University Press, 1961).

The most important ideological attack Patriots leveled against Loyalists during the Revolution was their supposed lack of virtue. As “An Inhabitant” argued in New York, supporters of England were guilty of being “some of the basest villains that ever disgraced any society.” The Massachusetts Minister, Nathaniel Whittaker, in his sermon, “Discourses Against Toryism,” lambasted Loyalists for not only their treasonous support of England but for their depraved indifference towards their fellow countryman. As he wrote, “yet, with horror be it spoken, there are free-born sons of *America*, so lost to all sense of honor, Liberty, and every noble feeling, as to join the cry, and press for submission.” Whittaker did not stop there. The whole point of Whittaker’s sermon concentrated on how, because they lacked republican virtue, Loyalists were stripped of the protection of civil society.<sup>17</sup> Although delivered as a sermon, little in the way of “Christian republicanism” exists; Whittaker’s screed, while structured in the familiar form of a sermon, was secular in nature.<sup>18</sup> The virtue upon which he expounded was not that of Christian morality. Instead, Whittaker accused the Loyalists of placing their own self-interest above that of the community, thereby depriving them of their rights.

Despite the secular nature of Whittaker’s sermon, it still should not be surprising that a man of the cloth would accuse Loyalists of being deprived of virtue. Whittaker was not the only individual during the Revolution to accuse Loyalists of depravity and corruption. Thomas Paine shared most Americans’ sentiments regarding the Tories. In “The Crisis,” Paine wrote of Loyalists, “And what is a Tory? Good God! What is he? . . . Every Tory is a coward, for a servile, slavish, self-interested fear is the foundation of

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<sup>17</sup> “An Inhabitant” May 19, 1775, in Force, ed. *American Archives*, Series 4, vol. 2, 644; Nathaniel Whittaker, “Discourses Against Toryism” (Massachusetts: John Mycall, 1777), 14, 19.

<sup>18</sup> The term “Christian republicanism” is mine and is intended as an abbreviation of the argument, which I accept, of Christianity’s deep influence upon Americans.



Toryism; and a man under such influence, though he may be cruel, never can be brave.”<sup>19</sup> Other members of the Continental Congress as well as their constituents shared Paine’s sentiments. In numerous letters, both members of Congress and citizens voiced their suspicion and hatred of Loyalists. Congressional member, William Whipple, told one of his constituents in the middle of the war that he wished some states would adopt programs banishing Loyalists from the country. According to Whipple, Loyalists were “wretches” who would “ever . . . be curses to Society.”<sup>20</sup>

Legislative enactments directed at Loyalists often stated how the depravity of Loyalists necessitated the measure. Pennsylvania’s Test Act of 1777 noted that “sordid and mercenary motives” forced the state to enact the law delineating between a virtuous Patriot and unnatural Loyalists.<sup>21</sup> Maryland’s “Act to Punish Certain Crimes and Misdemeanors, and to Prevent the Growth of Toryism” was even more explicit of the baseness of Loyalists when it stated that its clemency policy had failed to reclaim Tories “from their evil Practices,” leaving them “still pursuing their dark and criminal designs of enslaving America.”<sup>22</sup> Delaware’s “Act of Free Pardon,” issued in the summer of 1778 acknowledged some Americans were influenced by the “deluded or wicked” into joining the British cause. Thus their pardon – like those issued by other states during the

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<sup>19</sup> Thomas Paine, “The American Crisis, Number 1,” December 19, 1776, in Thomas P. Slaughter, ed., *Common Sense and Related Writings by Thomas Paine* (Boston: Bedford, 2001), 129.

<sup>20</sup> William Whipple to John Langdon, February 1, 1779 in Gerald W. Gawalt, ed., *Letters of Delegates to Congress, 1774-1789* (Washington, D.C.: Government Printing Office, 1976-1990), 12: 43.

<sup>21</sup> Pennsylvania, “An Act Obliging the Male White Inhabitants of this State to Give Assurances of Allegiance to the Same, and for other Purposes Therein Mentioned,” June 13, 1777, in James T. Mitchell and Henry Flanders, eds., *Statutes at Large of Pennsylvania: 1681-1809* 18vols. (n.p. WM Stanley Ray, 1896-1915): 8: 18-19.

<sup>22</sup> Maryland, “Act to Punish Certain Crimes and Misdemeanors, and to Prevent the Growth of Toryism” in *Laws of Maryland, February 5, 1777-April 20, 1777* (Annapolis: n.p. 1777), Chapter XX.

Revolution – allowed Americans to regain a virtue lost by the seductions of Tories.<sup>23</sup>

Finally, the boldest claims of Loyalist wickedness found in legislative dictums came from the Continental Congress, and especially the passage of its January, 1776 “Tory Act.”

Issued at time when independence was still out of most American’s minds (although Tom Paine’s “Common Sense” was published later that month), “The Tory Act” was explicit about how Americans should regard their domestic enemies. The Resolution stated:

And with respect to all such unworthy Americans [i.e. Loyalists], as regardless of their duty to their creator, their country, and their posterity, have taken part with our oppressors, and influenced by the hope or possession of ignominious rewards, strive to recommend themselves to the bounty of administration by misrepresenting and traducing the conduct and principles of the friends of American liberty, and opposing every measure formed for its preservation and security.<sup>24</sup>

The “Tory Act” provides the best example during the Revolution of what Whittaker, Adams, Paine, and others who condemned Loyalists meant when they asserted that Loyalists lacked virtue. The condemnations drew on the three key elements of republicanism. First, Tories relied upon England for their place in politics and society. In other words, to Patriots, the Loyalists were nothing more than the stool pigeons of English tyranny. Second, Loyalists moved against and did everything in their power to prevent the securing of American liberty, thus making an already delicate liberty even more vulnerable. Finally, abandoning their obligation not only to future and current Americans but the Almighty, himself, the Loyalists clearly lacked the virtue demanded from republican citizenship to maintain and defend liberty.

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<sup>23</sup> Delaware, “An Act of Free Pardon” June 26, 1778, in Delaware, *Laws, Statutes, etc. 1778* (Wilmington: n.p. 1778), 1-8. Also see New Hampshire’s “Oath of Allegiance” broadside issued in 1776.

<sup>24</sup> “The Tory Act,” January 2, 1776, *Journals of Continental Congress, 1774-1789*, 34 vols., ed. Worthington C. Ford (Washington, D.C.: Government Printing Office, 1906), 4: 23.

All three of ideological attacks go a long way in explaining much of the action – both legal and extra-legal – taken against Loyalists. As Samuel Adams told James Warren in 1778, “Shall those traitors who first conspired the ruin of our liberties: those who basely forsook their country in her distress . . . who have been ever since stimulating and doing all in their power to aid and comfort them, while they have been doing their utmost to enslave and ruin us, – shall these wretches have their estates reserved for them?”<sup>25</sup> This passage by Adams displayed the link between the ideological reaction to the Loyalists and the actions states took against them. The idea that the citizenry must have virtue to maintain itself was also a powerful motivation to states and its citizens to remove those who appeared to have lost their way and supported England. This motivation made even more sense when paired with the other aspects of republicanism that influenced American thought. Not only were Loyalists lacking in virtue but it was republican ideology that explained why they were bereft of it. Furthermore, these attacks on Loyalists suggest that the idea of virtue Americans employed during the Revolution may not be as multi-dimensional as some scholars contended; rather, it appeared to be the secular concept more commonly associated classical republicanism.<sup>26</sup> In other words, in

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<sup>25</sup> Samuel Adams to James Warren, October 17, 1778, in William V. Well, ed. *Life and Public Services of Samuel Adams*, 3 vols. (Boston: Little, Brown, and Co. 1865), 3: 49-50. This can also be seen in Whittaker’s Sermon “A Discourse Against Toryism.” The argument present in the previous pages goes a long way, I think, in answering Joyce Appleby’s call for an explanation as to why Revolutionary American adhered to the ideas of republicanism. While praising the republican interpretation for demonstrating the branch of ideas associated with Commonwealth men and the Country opposition, she criticizes the very same scholars and cautions other historians to not use these ideas as a “dues ex machine to explain causes for belief. Examining the content of the revolutionary mind does not relieve the historian of the responsibility for explaining what compelled belief, what triggered reactions, what stirred passions, and what persuaded colonists of the truth of their interpretations.” It would appear from some of the evidence presented here that the Loyalists were cause enough to believe in republicanism. See Appleby, “Liberalism and the American Revolution,” 3-26, quote, 5.

<sup>26</sup> Kloppenberg, “The Virtues of Liberalism,” 9-33. Kloppenberg has argued that in pre-Revolutionary American contained not one but three main ideas regarding virtue: Protestant Christianity, Classical Republicanism, and Liberal Morality. The virtue taught by Christianity was that of forgiveness, charity, and personal morality. The idea of virtue endorsed by republican theorists, while not wholly removed from

the ideological reaction to Loyalists during the war, no concern for individual rights or morality existed as it did in other aspects of republican thought. Regarding the Loyalists at least, Americans employed the ideas – with great effect – of classical republicanism.

Examining the ideological resistance to Loyalists reveals an aspect of American republicanism that scholars have generally underplayed yet was a serious obstacle to Loyalist reintegration. According to classical republican theory, for a republic to exist and for its citizen to have and keep virtue, political dissent of any serious degree – such as that offered by the Tories – could not be tolerated. This intolerance should not be confused with blinded prejudice or unthinking biasness, however, since it had a coherent set of beliefs behind it. With the writings of Montesquieu in the early eighteenth century, republican theorists accepted – despite the challenge offered by David Hume – that for a republic to survive it had to be geographically small with a heterogeneous population that shared similar political beliefs.<sup>27</sup> Even within this type of republic, disagreements can be easily found, but it was the degree of these contentions that determined whether the populace could tolerate them. If a faction became too contentious or too threatening to the stability of a body politic, that faction would have to be dealt with in some manner.<sup>28</sup>

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Christianity, was, nonetheless, secular in nature. Often labeled “Montesquieuian,” since its clearest expression is found in Montesquieu’s *Spirit of the Laws*, this virtue not that of the chaste virgin or the morality of the ordained clergy – although these traits were not discouraged; it was, rather the virtue of supplanting individual interests in favor of the community’s. Finally, the idea of liberal morality, as Kloppenberg and Appleby have noted, was not the selfish individualism found in Thomas Hobbes’ *Leviathan*; instead, it was idea that individual rights were divinely given. In other words, natural law was the embodiment of individual rights, and since these rights were given by God, people were – or should be – guided by moral principles. As Kloppenberg argues, this Lockean understanding of individual rights was later transformed by the members of the Scottish Enlightenment. Through the works of Francis Hutcheson, David Hume, and Adam Smith, Locke’s natural law moralism was modified and transformed – but never fully abandoned – into, reason, custom, and, in the case of Smith, the market-place of capitalism

<sup>27</sup> David Hume, “That Politics May be Reduced to a Science,” in Charles W. Hendel, ed., *Hume: Political Essays* (Indianapolis: Bobbs-Merrill, 1953), 12-23. Hume’s challenge to Montesquieu as developed by James Madison in *Federalist 10* would later dethrone this idea.

<sup>28</sup> Richard Hofstadter, *The Idea of a Party System: The Rise of Legitimate Opposition in the United States, 1780-1830*, (Berkeley: University of California Press, 1969).

Although some politicians such as James Madison would, in a short span of years, challenge the idea that political factions were inimical to republican stability, the continual attacks on Loyalists revealed how, during the Revolution and immediately after, the more traditional idea prevailed. In fact, even Madison's thesis, when offered in *Federalist 10*, was not universally endorsed or celebrated.<sup>29</sup>

As the previous chapter noted, with the signing of the Treaty of Paris, the antagonisms against Loyalists re-emerged with tremendous veracity. Numerous petitions from various local bodies, letters to and from Congressional delegations, private letters, and further anti-Loyalist legislation passed by several states all show the intensity of the issue. What is more, each of these actions, much like their wartime precursors, employed republican ideas in their salvos against returning or keeping Loyalists.

In June of 1783, several months after the reception of the Preliminary Treaty, a proceeding of "Freeman" in Philadelphia addressed the issue of allowing Loyalists to return to their homeland.<sup>30</sup> The group issued a resolution expressing its reasons for not allowing Loyalists to return. The influence of republican ideology was evident when the resolution stated that the re-admittance of Loyalists should not be permitted because they were "lost to all decency, virtue, and public spirit." Not only were they deprived of decency and virtue, but the Loyalists, the resolution continues, had in their wickedness

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<sup>29</sup> Douglass Adair, "The Tenth Federalist Revisited" and " 'That Politics Maybe Reduced to a Science:' David Hume James Madison, and the Tenth Federalist," in Trevor Colbourn, ed., *Fame and the Founding Fathers: Essays by Douglass Adair* (New York: Norton 1973; reprint, Indianapolis: Liberty Fund, 1998), 106-151; Lance Banning, *The Sacred Fire of Liberty: James Madison and the Founding the Federal Republic* (Ithaca: Cornell University Press, 1995), 202-214; Herbert Storing, *What the Anti-Federalist were For* (Chicago: University of Chicago Press, 1980); Graham Walker, "Virtue and the Constitution: Augustinian Theology and the Frame of American Common Sense," in Gary L. Gregg II, ed., *Vital Remnants: America's Founding and the Western Tradition* (Wilmington: ISI Books, 1999), 99-150.

<sup>30</sup> For the sake of brevity it needs to be assumed that when discussing the return of the Loyalists; it also includes those Loyalists who remained in America.

“feasted with a malevolent satisfaction” at Patriot sufferings. Finally, the group of Freeman informed the State legislature that they would take it upon themselves to measure the character of all entering strangers to determine whether they met the requirement necessary to be considered Patriot citizens.<sup>31</sup> Thus, because the Loyalists were possessed more of malice than virtue, they could not be permitted to return.

Philadelphia’s Freeman were not the only ones to pass resolutions calling for the non-admittance of Loyalists. Local groups from all across the country issued resolutions; from New York City and Charleston, South Carolina to Boston, Massachusetts and elsewhere all noted that Loyalists were not welcomed in their state and local communities. The republican ideas behind why these communities were adamant about not allowing returning Loyalists are not buried in context or subtext nor are they polemics; rather, they make up the core arguments against why Loyalists should not be allowed to return. Just like the wartime condemnation of Loyalists, these resolutions focused on the idea that Loyalists were bereft of virtue and, as such, should not be allowed to return to reside in the land they had tried to destroy.

In New York City, main refuge of displaced Loyalists during the War and the main port of departure for those fleeing America after the conflict, an anonymous writer appealed to the state legislature asking why citizens of the state should expect former Loyalists to become good Americans.<sup>32</sup> The rhetorical question was answered by a set of instructions to state legislatures issued by a group of New York City mechanics, who argued that it was not only bad policy to allow the Tories to return but it also endangered

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<sup>31</sup> “Proceedings of the Freeman of the City and Liberties of Philadelphia,” in *The Pennsylvania Gazette*, June 18, 1783. The same resolution was reprinted in *South Carolina Gazette*, July 8 and 26, 1783.

<sup>32</sup> “An Appeal to the Legislature,” n. d., *The Independent Gazette or the New York Journal Revived*, March 11, 1784.

the stability of the city. Loyalists had openly avowed their support to England and had worked to subvert law and order and social stability. Therefore, the mechanics implored the state to not readmit Loyalists and expel those remaining.<sup>33</sup> In Saratoga, site of the Continental Army's most stunning victory, another committee resolved that Loyalists should not be permitted to participate in the community. Using harsher language than most of these resolutions, the Saratoga committee argued that the Loyalists were a "species of villainy" that, if they could have worked their will, would have made slaves of Americans. The committee asserted that any Loyalist attempting to return to the area would be "treated with the severity due to his crimes and infamous defection."<sup>34</sup> In Rombout, South Carolina, another committee used similar, but less harsh, language in their resolution claiming that "fugitive" Loyalists would be treated as enemies of independence because of their "ambition, avarice, and perfidy."<sup>35</sup> Not to be outdone, Boston committees also endorsed a policy of exclusion. In a committee that had Elbridge Gerry as one its members, the group, reacting to rumors regarding the re-admittance to Tories, noted that doing so would sow "civil discord" and political instability by having supporters of monarchical England in the midst of republican America. Furthermore, this committee, just like its counterparts throughout the country, employed the republican lexicon of corruption and virtue to explain their position.<sup>36</sup> Among the last newspaper printings regarding the return of the Loyalists came from Boston in early 1785, a year and

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<sup>33</sup> "Instructions to the Honourable Representatives in Assembly, for the city and county of New York, from the Mechanics Body, the Grocers, Retailers, and Innkeepers, Electors within said City," January 9, 1784, in *Independent Gazette or the New York Journal Revived*, January 29, 1784.

<sup>34</sup> "At a Meeting of the Inhabitants of the District of Saratoga, in the County of Albany held on Tuesday the 6<sup>th</sup> Day of May, 1783," in *The New York Gazetteer or Northern Intelligencer*, May 26, 1783.

<sup>35</sup> "At a Meeting of the Good People of Rombout's Precinct," May 27, 1783, in *South Carolina Gazette and General Advertiser*, July 22, 1783.

<sup>36</sup> "A Meeting of the Freeholders and other Inhabitants of this Town," April 24, 1783, in *The Boston Gazette*, May 5, 1783.

a half after the reception of the treaty of peace and nearly four years from the victory at Yorktown. In “The Observer, no. X,” the author lambastes the state legislature for allowing the return of some Loyalists and the citizens of the Massachusetts for not protesting more on the issue. “The Observer” warned, just as previous committee resolutions had, that the malice of the Loyalists would “sap the foundation of our great superstructure of independence” and would, if permitted to reside in Massachusetts, “intoxicate our your with” vice. The only remedy was removing the Loyalists.<sup>37</sup>

These resolutions and writings based their reasoning on the fact that Loyalists would be unable to participate in the community because they lacked the ability to put the community’s interest above their own; their actions during the Revolution, the resolutions make clear, prove the point. Not only this, but these resolutions also belie a fear held by many Patriots: namely, that if Loyalists were allowed re-admittance, they would infiltrate both society and government, and, because they lacked virtue and placed their own interest above the community’s, would fetter the populace with the tyranny just overthrown and possibly restore British rule. To put these fears in the context, the resolutions evoked the secular republican ideas that drove Revolution. Yet, something different about these resolutions can be detected. Unlike the Revolutionary condemnations of Loyalists these resolutions – as well as the other denouncements Tories – assumed that their readers understood the ideas being discussed. This insight is important because it meant several things about the nature of republican thought in Early National America. First, republicanism was widespread and accepted throughout all levels of American society, which seriously challenges many progressive and social

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<sup>37</sup> “The Observer,” in *The Massachusetts Centinel*, February 9, 1785.



historians' arguments that republican ideology was mostly confined to elites.<sup>38</sup> Second, these numerous resolutions signal that for several years after the peace, fierce opposition to the return of the Loyalists existed. Third, and the most important of all, this opposition, because it embraced classical republicanism, was fearful of the stark political opposition they feared Loyalists presented, and cared very little for the individual rights of returning Loyalists.

This final aspect of opposition – that of political intolerance and lack of concern for Loyalists individual rights – to allowing Loyalists to return was best expressed in another sermon by Nathaniel Whittaker. Unlike his 1778 sermon, however, this one, entitled “The Reward of Toryism,” damned the Loyalists in ways that few other attacks did throughout the entire period. Whittaker charged the Tories with “savage barbarity” celebrating in the “torture and blood” of the Americans. This treachery is made worse, he insisted, because the Loyalists supported the British. The whole point of the sermon, however, was to demonstrate six general points: That the Americans had struggled for years in defense of liberty; that the Tories were guilty of the “sin of Moroz,” that God the Tories be cursed; the implications of that curse; how the Loyalists should be treated; and the “fatal consequences” would be for not cursing the Loyalists.<sup>39</sup>

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<sup>38</sup> Gary Nash, *The Unknown Revolution: The Unruly Birth of Democracy and the Struggle to Create America* (New York: Viking, 2005); Edward Countryman, *A People in Revolution: The American Revolution and Political Society in New York, 1760-1790* (New York: Norton, 1989); T.H. Breen, *Tobacco Culture: The Mentality of the Great Tidewater Planters on the Eve of Revolution* (Princeton: Princeton University Press, 1985); Breen, *The Marketplace of Revolution: How Consumer Politics Shaped American Independence* (New York: Oxford University Press, 2004).

<sup>39</sup> Nathaniel Whittaker, “The Reward of Toryism” (Newburyport: John MyCall, 1783), 8-9. The sin of Meroz can be found in the Book of *Judges*, Chapter 5 verse 23, Chapter 21 verse 8-10, and the Book of Samuel 11:7. Meroz is an area north of Palestine. The inhabitants of the area were cursed by God when they refused to assist Barak against Sisera.

Despite the scriptural allusions, Whittaker's discourse – which really only concentrates on points four through six – is secular in nature. In fact, Whittaker actually rejects any notion of Christian forgiveness for the Loyalists. Claiming that those calling for forgiveness of Loyalist's sins

Must be very ignorant of the nature of a forgiving spirit, and of Christ's command too, who suppose that executing public justice on felons and murderers, is inconsistent therewith. Should this be admitted, we must resign all the good and happiness of society into the hands of thieves, robbers, and assassins. Love, forgiveness of enemies, and compassion, are most amiable virtues; but they degenerate into criminal weakness, as they spring from a vitiated heart, when they are employed to discharge criminals from consigned punishment.<sup>40</sup>

Whittaker is not denying the necessity of Christian forgiveness; he simply believes that extending it to returning Loyalists would be folly. This mistake, the minister notes, endangers the community and in true republican ideology he noted that “God and reason teach, that they who endanger the safety of the community should be removed from it; for the happiness of many is of more value than of a few: therefore *we are bound to seek the good of the state, in preference to that of individuals.*”<sup>41</sup>

Working from this fundamental republican principle, Whittaker explain points four through six of the sermon by giving six detailed and related reasons as to why the Loyalists should not be allowed into the nation (or what Whittaker calls “the community”). Most of these, in and of themselves, are derived from republican ideology, particularly the idea of virtue. First, the minister argues that the returned Tories would threaten the “internal peace” of the states. The mere presence of Loyalists would weaken the body politic because their presence would create discontent among citizens, who after the resettlement of Tories, “will soon hear them lamenting, if not cursing, their folly, for

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<sup>40</sup> *Ibid.*, 13.

<sup>41</sup> *Ibid.*, 14. Emphasis is mine.

risking their all, and loosing their dearest enjoyments on earth next to their liberty . . . [would now be] equally shared among their betrayers and murderers.<sup>42</sup> Second, readmitting Loyalists would be a “shameful breach of the public faith.” Whittaker asks, how could the people continue to place faith in their public ministers if they allow known enemies to reside in their midst? Third, reintegrating Loyalists would place the nation and states in constant threat and dangers. As Whittaker notes, “innumerable and constant dangers which will naturally result from having, in our bowels, a multitude of subtle enemies, void of all honor and virtue, who, as they never will be reconciled to us will plot our ruin.”<sup>43</sup> Fourth, Whittaker argues that should Loyalists be readmitted the “guilt of innocent blood” shed during the Revolution would be on the hands of the Patriots and not the English and their supporters.<sup>44</sup> Fifth, Whittaker believes that returning Tories would “soon engross the chief wealth” of the nation, and since “wealth usually begets power” they could reclaim lost political power thus throwing the country back into tyranny.<sup>45</sup> The sixth and final point Whittaker makes is that readmitting the Tories would result in an increase in taxes. This last point is never fleshed out by Whittaker because he claims that the point is not worthy of being discussed in the pulpit, a rather odd excuse to end a discussion considering the rest of the sermon.<sup>46</sup>

Whittaker was clearly influenced by republican ideas, as his detailed points, even the final, all too brief, sixth point, demonstrate. To be sure, the sermon’s use of higher taxes and the guilt of the innocents were rather unusual modes of attack regarding

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<sup>42</sup> *Ibid.*, 21-23, quote on 22.

<sup>43</sup> *Ibid.*, 23-25, quote on 23.

<sup>44</sup> *Ibid.*, 25-26.

<sup>45</sup> *Ibid.*, 26-30.

<sup>46</sup> *Ibid.*, 30.

keeping Loyalists out; yet, Whittaker fits them into a broader ideological frame centered on virtue. While the sermon was not the last salvo in the post-war struggle to keep Loyalists from returning, it does represent the most comprehensive ideological argument against reintegration. Yet Whittaker and the others who clamored to keep the Loyalists would, for the most part, lose their battle to prevent reintegration. Instead, a disconnected group from all regions of the nation began to advocate a policy of reconciliation that focused on the individual rights of Loyalists.

Whittaker alludes to this group in his sermon when he warns the “advocates for the Tories” that readmission would be tantamount to doom. This group of “Tory advocates,” however, while emulating the sometimes extreme hyperbole of Whittaker and others, believed that the real danger to the Republic rested in the intolerant and vengeful spirit against the Loyalists. Those calling for a peaceful return of the Loyalists, especially Benjamin Rush, Aedanus Burke, and Alexander Hamilton, shifted the argument away from whether the Loyalists possessed the virtue needed to maintain a republic and focused instead on the need of the community to respect the individual rights of the Loyalists – rights that were also the possession of Patriot Americans. To achieve a respect for Loyalist’s rights, reintegration advocates endorsed three separate arguments commonly associated with “Lockean liberal” ideology: morality, toleration (mercy), and economics.

Lockean liberalism embraced all of these features to one degree or another, depending on how Locke influenced a particular theorist (and the interpretation offered by the historian too, it needs to be said). What follows will examine, in some detail, the moralistic argument of Rush, the need for governmental mercy as argued by Burke, and

the market-based argument of Hamilton, as well as similar arguments posed throughout the country. Despite different emphasis, each writer was concerned with individual rights and the rejection of the political intolerance found in the republican thought of those rejecting the return of the Loyalists. Despite the Lockean liberalism found in their arguments, none of these writers denounce any other aspect of republicanism aside from intolerance. Each author believes in the base tenets of republicanism. What they are attempting, therefore, is not a refutation of American political thought as it had been understood for the past several decades. Rather, they argue for an alteration in the nature of republicanism by making individual rights a cornerstone of republican thought. Thus, it is at this moment, in the debate over the return of Loyalists, that for the first time during the early days of the nation that the blend of liberalism and republicanism occurred.

More important than the blending of rival ideologies, was what these three authors – either outright or through implication – advocated: a liberty of *political* conscience, the right to possess drastically different political beliefs from the rest of the community. This shift in ideology was a significant moment in the reintegrating of Loyalists. Arguing for an acceptance of political enemies as well as calling for a respect of their rights was a critical development in making Loyalists into Americans. By continuing to view them as void of virtue and threats to the social and political stability of the new nation not only kept Loyalists as second class citizens, but it also kept them from becoming active participants in both the body politic and economic development of the new nation. What is more, depriving Loyalists of their rights actually threatened the

rights of all Americans. Rights that American believed to be inviolable, were made less so because a noticeable portion of the population were denied them.

All of these ideas were at the forefront of Benjamin Rush's thoughts when he published his essay on repealing the Test Act. The occasion that led Rush to publish his 1784 "Considerations upon the Present Test Law" was the Pennsylvania Assembly's failure to repeal its 1778 Test Act.<sup>47</sup> The Act called for all white male residents to swear an oath of allegiance to the newly independent state and to renounce subjection to George III as well as support "at all times . . . the freedom, and sovereignty, and independence" of Pennsylvania.<sup>48</sup> Throughout the early 1780s, the Pennsylvania Assembly attempted several times to repeal the act, but failed due to the rancorous and radical political situation which often turned the issue of Loyalism into a political football punted back and forth.<sup>49</sup> What made this particular episode different is that it came after the official reception and conclusion of Treaty of Peace and it propelled Rush to speak against it.

Rush was an avid pamphleteer for most of his life, writing on a wide range of topics, from temperance, chemistry, and anti-slavery, to female education, medicine and health and, in this sense, his "Considerations on the Test Act" was no different. But in many ways, Rush's "Considerations" differs greatly from the rest of his public writings in that the pamphlet is his most political and is perhaps the most blatant expression of his

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<sup>47</sup> For the political contest over the enactment and attempts at repealing the Test Act, see Robert Brunhouse, *The Counter-Revolution in Pennsylvania, 1776-1790* (Philadelphia: University of Pennsylvania Press, 1954), 152, 154-155, 197-198, 277-278 and Anne Ousterhout, *A State Divided: Opposition in Pennsylvania to the Revolution American Revolution* (New York: Greenwood Press, 1987), 184-228, 279-317.

<sup>48</sup> Benjamin Rush, "Considerations upon the Present Test Act of Pennsylvania: Addressed to the Legislature and Freeman of the State" (Philadelphia: Hall and Sellers, 1784), 3.

<sup>49</sup> Brunhouse, *Counter-Revolution*, 152, 154-155, 197-198, 277-278.

general political thought. Two main themes run throughout the “Considerations,” the immorality of the Test Act and the threat to individual rights that it poses.<sup>50</sup>

For Rush, a direct link existed between the immorality of the Test Act and how it violated individual rights. Rush asserted that the Pennsylvania Test Act was a violation of one’s right to self-conscience. The Act forced both Loyalists and non-jurors (i.e. Quakers) to agree to something they opposed to or had not yet decided to support. As Rush notes, “the test-law . . . is an invasion of the rights of conscience, and a direct act of persecution for conscience sake.”<sup>51</sup> Rush attacked the intolerant aspect of republicanism found in many of the anti-Loyalists tracts during and after the war. He expressed disappointment in the intolerance American held towards those refusing to take the oath, believing that “human nature was improving” with the growing sense of religious tolerance, but the religious acceptance that he saw developing did not transfer to the political arena. He continued, “In vain do we boast of the toleration of all religious sects in our government, while we persecute for *opinions* in politics.”<sup>52</sup> The problem with this intolerance, Rush claimed, aside from the fact that it plays to the most base elements of human nature, was that since the measure’s enactment in 1778, it created more Tories than existed before its passage. Moreover, Rush argued that he would not condemn anyone who accepted the British cause over the Patriot’s cause after this measure: “I do not wonder that they preferred foreign to domestic tyrants.”<sup>53</sup>

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<sup>50</sup> There is a minor argument within the pamphlet that calls the Test Act a violation of the Pennsylvania Constitution. This argument will be more fully explored in the next chapter.

<sup>51</sup> Rush, “Considerations,” 11.

<sup>52</sup> *Ibid.* The emphasis is Rush’s.

<sup>53</sup> *Ibid.*, 11, 15.

Demonstrating his adherence to a moral form of republicanism, Rush further impugned the morality of the act on scriptural grounds, and considering Rush's devout adherence to Christianity, this appeal should not be surprising.<sup>54</sup> Although it is not known if he read Whittaker's sermon against reintegrating Loyalists, Rush nonetheless provided a serious counterargument to the minister's sermon. Rush warned supporters of the Test Act of bringing forth God's judgment, but he moved away from this, claiming with some sarcasm, that examples from the Old Testament of God's wrath are not meant for modern times. Yet, if Old Testament lessons are not applicable it does not matter, Rush claimed, because the teachings of Christ were enough to compel repeal of the Act. At a time when Whittaker was condemning as ignorant those who would offer Jesus' forgiveness to Tories, Rush argued that forgiveness is exactly what should happen. Citing the "Sermon on the Mount," in which Jesus teaches the "Golden Rule" of "do unto others, as you would have done unto you," Rush argued that this teaching was intended to foster forgiveness. He then cautioned against not forgiving Loyalists and others not taking the oath while asking for the forgiveness of their own sins.<sup>55</sup>

Rush offered two methods to rectify the problem posed by the Test Act. The first, obvious enough, was to repeal the measure. The other method involved accepting political opposition – even of the type offered by Loyalists – as a legitimate part of the political process. In one of the more important parts of his pamphlet and in direct confrontation with the musings of anti-Loyalists, Rush argued that because someone refused to take the oath of allegiance did not mean that they lacked virtue or could not

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<sup>54</sup> Donald J. D'Elia, "The Republican Theology of Benjamin Rush," *Pennsylvania History* 33 (April 1966): 187-203.

<sup>55</sup> Rush, "Considerations on the Test Act," 18. The Sermon on the Mount is in the Book of Matthew, Chapter 6.



place the community's interest above their own. Rush even implied that non-oath takers also share in some of the success of the Revolution because even the most mundane activities helped erect the temple of liberty. He further noted that those refusing the oath "are in general industrious, frugal, [and] temperate body of people. Whatever their political principles may be, they are for the most part republicans in dress and manners."<sup>56</sup> Rush claimed, therefore, that Loyalists and others not taking the oath were – for the most part – just as firm believers in republicanism as himself. It was up to those who opposed the Loyalists to accept and forgive them of their wartime sins.<sup>57</sup> These passages suggest that Rush has no difficulty in seeing a connection between republican ideology – but only a republicanism steeped in moral teachings such as toleration – and individual freedom. In fact, while Rush believed it was important for individuals to assist the community he did not believe that meant a supplanting of individual rights, especially the freedom of conscience. Moreover, Rush's political thinking as suggested in the "Considerations" offered a rare mixture of both moral republicanism and Lockean Liberalism.<sup>58</sup>

While Rush was busy in Pennsylvania trying to convince the legislature to repeal the Test Act, Aedanus Burke in South Carolina, fought his own battle against some of that state's anti-Loyalists measures and actions. Writing under the name of "Cassius," Burke challenged several of the more notorious anti-Loyalists measures passed soon after the British evacuated Charleston in early 1782. "Cassius" devoted one the main themes

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<sup>56</sup> *Ibid.*, 12, 17.

<sup>57</sup> *Ibid.*

<sup>58</sup> Rush was not the only one to make this connection but his argument was, by far, the most complete and comprehensive. For the other arguments see "Cadidus" (which, for different reasons, will be discussed below) in *The Political Intelligencer and New-Jersey Advertiser*, April 14 and 21, 1784; "A Friend to Prudence," *Connecticut Gazette*, May 30 and June 6, 1783

of his argument to South Carolina's need to show mercy and a respect for the individual rights of Loyalists. The essay concentrates on seven categories, but it is the final three points of Burke's essay, on the South Carolina Confiscation Act, the Amercement Act, and for the need of an amnesty bill, that deal with the Loyalists.

A known moderate in his political thinking and attitude, Burke was appalled by what he considered the vicious attack against Loyalists conducted after the British pullout.<sup>59</sup> To him, it appeared that South Carolina had delved into the depths of anarchy through a lust for revenge. This desire for revenge resulted in the suffering of both Loyalists and Patriots, a suffering made worse by the passing of Confiscation and Amercement Acts. Burke's impressions are at sharp odds with what historians have argued about South Carolina – that it was more moderate or lenient towards Loyalists when compared to other states.<sup>60</sup> For Burke, these acts were nothing more than the legislative sanctioning and endorsement of the vengeance gripping the state. These acts, Burke noted, made those who may have supported England “fear and feel misery.”<sup>61</sup>

What really made these acts so repugnant was their deprivation of justice. He notes that the laws, which gave no legal recourse or appeal, was “striking a blow of vengeance under the makes of justice, [which] is the most to be execrated of all iniquity.”<sup>62</sup> Dovetailing into Rush's argument, Burke remonstrated against the acts because they destroyed people for the sake of their beliefs. According to the South

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<sup>59</sup> Aedanus Burke, “An Address to the Freeman of the State of South Carolina” (Philadelphia: Robert Bell, 1783), 1-16. For Burke's moderation, see Jerome J. Nadelhaft, *The Disorders of War: The Revolution in South Carolina*, (Orono, ME: University of Maine at Orono Press, 1981), 71-87, and John C. Meleney, *The Public Life of Aedanus Burke: Revolutionary Republican in Post-Revolutionary South Carolina*, (Columbia: University of South Carolina Press, 1989), 71-90.

<sup>60</sup> Charles G. Singer, *South Carolina in the Confederation* (Philadelphia: private printer, 1941; reprint, Philadelphia: Porcupine Press, 1976); McGrady, *History of South Carolina*; and Nadelhaft, *The Disorders of War*.

<sup>61</sup> Burke, “An Address to Freeman,” 17.

<sup>62</sup> *Ibid.* 22.

Carolinian those who openly sought the protection of the British during the war were now choosing to remain after the British evacuation. The confiscation of their property and the amercement of their debt, done after the evacuation when the choice for staying or leaving was clearly over, was tantamount to a persecution of belief.<sup>63</sup> Keeping the acts would taint with treason “many worthy citizens, and of as good families as any we have.” Not only would the stain of treason be smeared on otherwise good people, but the acts would “also serve to keep alive the memory of the troubles of present day.”<sup>64</sup>

Perhaps even more important than these problems, Burke argued that these laws violated the rights of not just former Loyalists but also threatened those of well-known Patriots. The Confiscation Act was a violation of not just “personal and civil rights” of those the acts targeted but also risked “drawing down a curse on ourselves and posterity for cruelty and injustice” that could endanger the new nation.<sup>65</sup> What Burke alluded to was that leaving the measures intact threatens the characteristics needed for liberty, namely moderation, temperance, and simplicity. Thus, Burke argued that the greed for taking former Loyalists lands fractured the simplicity required for republican government; the vengeance and cruelty he believed embodied the two acts threatened everyone’s rights were the inverse of the moderation and temperance that helped secure rights.

Burke ended his discussion with an appeal to the legislation to pass an act of oblivion that would “bury . . . past transactions.” Enacting such a measure would calm the passion that dominated the climate towards Loyalists and would stop the “carrying on

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<sup>63</sup> *Ibid.*, 26-32.

<sup>64</sup> *Ibid.*, 25.

<sup>65</sup> *Ibid.*

[of] hostility under the shape of justice, which is the most oppressive, and of all other injustice, excites the greatest detestation, and the most violent factions and divisions.”<sup>66</sup>

This sentence synthesizes Burke’s argument and is a prime example of the republican ideas that persist in the pamphlet. To Burke, it was of the utmost importance to have a respect for individual rights even if these rights were shared by those considered a threat to political hegemony. The proposed act of oblivion, moreover, offered forgiveness. But this pardon was different than the one mentioned by Rush. Whereas Rush hoped that this forgiveness would be scripturally based and would therefore represent a change in the minds of individuals, Burke, while welcoming a change in the minds of his fellow South Carolinians, did not share Rush’s optimism about a change, nor did he base his forgiveness on Christian tenants. This lack of optimism explains why he called for legislative forgiveness and Rush did not. As Burke noted, this law allowed time for passions to cool and for people to realize that to allow those remaining Loyalists to return severed the best interest of the community. Therefore, the virtue threatened by the intemperate legislative actions against Loyalists could be restored and maintained. Finally, Burke, even more than Rush, demonstrated the beginning arguments for a newer concept of virtue that blended the vigilance of rights with the interest of the community.<sup>67</sup>

Although Burke was not the only pamphleteer in South Carolina to advocate mercy for Loyalists, his work was the most comprehensive, forceful, and influential,

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<sup>66</sup> *Ibid.*, 20.

<sup>67</sup> This blending can be found in the next to last paragraph of Burke’s work. As he noted somewhat obtusely, “If every citizen cannot enjoy the rights of election and representation [other aspects of the pamphlet not discussed in this chapter] according to the constitution, I hope this body will be so idle as to talk of Liberty. This, and the revised of the three acts above mentioned, is the measure, and the only one that can reconcile us to the friendship of each other; it will put an end to silly distinctions and factions: leave us at liberty to shake hands as brethren, whose fate it is to live together; and it will stand as a more lasting monument of our national wisdom, justice and magnanimity, than statues of brass or marble.” *Ibid.*, 32.

going through several reprintings across the country.<sup>68</sup> Yet, Burke's and Rush's works – despite being widely read and facing their fair share of rebuttals – were not the most influential or even reprinted work that called for a respect of Loyalists rights.<sup>69</sup> That title belongs to Alexander Hamilton and his two pamphlets, written under the pseudonym of Phocion. Written in the winter of 1784, and in direct response to the threat of further action against Loyalists in New York City, Hamilton's essays, when read together, are the single most important writings on the reintegration of the Loyalists, and, because they cover such a wide spate of issues, they should rank as among the top political writings of the 1780s.<sup>70</sup>

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<sup>68</sup> The other writing is that of Thomas Tudor Tucker, "Conciliatory Hints, Attempting by a Fair State of Matters to Remove Party Prejudice," in Charles S. Hyneman and Donald S. Lutz, eds., *American Political Writings during the Founding Era, 1760-1805*, 2 vols. (Indianapolis: Liberty Fund, 1983), 1: 606-630.

Most of Tucker's pamphlet, however, deals with issues beyond the call for mercy for Loyalists. Nonetheless, Tucker does call for a policy of mercy when dealing with remaining Loyalists, believing that the suffering of Tory women and children should serve as reason enough as to why the anti-Loyalists laws need repealing. Also see "Judge Burke's Charge to the Grand Jury," in *South Carolina Gazette*, December 16, 1783.

<sup>69</sup> For rebuttals or other attacks against these writings see Anonymous, *The Pennsylvania Gazette*, January 19, 1785; "Candid," *The Pennsylvania Gazette*, January 19, 1785; "The Observer," *The Pennsylvania Gazette*, January 26, 1785; "Numbers I, II, and III" *The Pennsylvania Gazette*, March 2, May 18 and June 15, 1785.

<sup>70</sup> New York's actions against the Loyalists after the Revolution can be found in *Laws of the State of New York in Force Against the Loyalists, and Affecting the Trade of Great Britain, and British Merchants and Others Having Property in that State* (London, 1786); Alfred F. Young, *The Democratic-Republicans of New York: The Origins, 1763-1797* (Chapel Hill: University of North Carolina Press, 1967), 1-85; John Thomas Reilly, "The Confiscation and Sale of Loyalists Estates and Its Effect upon the Democratization of Landholding in New York State, 1799-1800" (PhD Dissertation Fordham University, 1974); and Judith Van Buskirk, *Generous Enemies: Patriots and Loyalists in Revolutionary New York* (Philadelphia: University of Pennsylvania Press, 2002), 155-196.

Historians studying Hamilton's political thought have made surprisingly little of his Phocion essays. Instead of examining them for what they were, learned essays on the importance of the Treaty and need to reintegrate Loyalists, scholars have often lumped them with Hamilton's other writings of the Revolutionary and pre-Constitutional period. Thus, what happens is that the essays tend to be glossed over in search of overarching themes in Hamilton's thought. This certainly is not a bad thing since much of Hamilton's political thought still appears to be unattainable by historians, but it does a poor service to what is one of Hamilton's most important political writings. See Gerald Storz, *Alexander Hamilton and the Idea of Republican Government* (Stanford: University of Stanford Press, 1970), especially 1-75; Karl Frederick Walling, *Republican Empire: Alexander Hamilton on War and Free Government* (Lawrence: University Press of Kansas, 1999); Forrest McDonald, *Alexander Hamilton: A Biography* (New York: Norton, 1981); and John C. Miller, *Alexander Hamilton: A Portrait in Paradox* (New York: Harper, 1959); Douglass Scott Broyles, "The Political Philosophy of Alexander Hamilton" (PhD Dissertation, Banniff Graduate School, University of Dallas, 2003). For similar trends in Hamilton's thinking throughout his

What makes the Phocion essays of so much significance is their great learning and reasoned argument. Although a great deal of the essays concentrates on the need to follow the Treaty of Paris, they also offered a succinct argument on the importance of reintegrating the Loyalists. In fact, these writings are just a part of a larger set of actions by Hamilton that were geared towards reintegrating Loyalists, including defending Loyalists in several notable court cases. Yet, Hamilton's essays are different than the ones authored by Rush and Burke. Although the New Yorker rejected the anti-Tory spirit found in the public sentiment and expressed by the passing of the 1783 Trespass Act, he also made a noted appeal on how suppressing the Loyalists would be detrimental to the economy of the state and the nation. In other words, Hamilton, more than most Americans at this point, saw the true economic benefits of having Loyalists peacefully reassimilated. To achieve this benefit, however, he knew that the only way to turn former Tories into productive Americans was to tear down the legal barriers and to shift New Yorkers' (and Americans') thinking away from vengeance and towards decent respect of individual rights. Thus, much more than anyone else, Hamilton blended the ideas of republicanism with the ideas of liberalism to shape his argument for allowing Loyalists to live in peace.

Hamilton opened his essay by condemning the "inflammatory and pernicious doctrine" that allowed for a subversion of "private security and genuine liberty." He noted that the "spirit of Whiggism," of which virtue serves as a linchpin, is one of generosity and justness. Yet those who oppress the Tories, including the legislature of

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career see Aaron N. Coleman "'Another Bounaparty?': A Revaluation of Alexander Hamilton during the Franco-American Crisis, 1796-1801," *Journal of the Early Republic* 28 (Summer 2008): 183-214.

New York and its Trespass Act, acted with such a violent spirit of vengeance that it threatened the very foundation of the body politic; it was in fact, the work of tyrants.<sup>71</sup> Hamilton even acknowledged that there was “nothing more common” than for a people to become over-passionate towards their enemies during the heights of conflict. With war’s end, however, these passions needed to cool and transform into a renewed respect for private rights; otherwise, giving the title of liberty to “such a government would be a mockery of common sense.” Hitting upon the threat this law posed to the overall body politic and not just the Loyalists, Hamilton argued that these “imprudent Whigs” who clamored for the measure threatened to place permanent corruption in the government and establishing a bad precedent for the future of individual rights.<sup>72</sup>

Hamilton lectured the New York legislature over the definition of liberty, arguing that liberty was the enjoyment of “common privileges of subjects under the same government.” Hamilton’s definition of liberty was rather significant for allowing Loyalists to return because it left the choice to remain or return in the hands of the Loyalists and, as such, Hamilton insisted they should be allowed to enjoy the privileges of citizenship. Enacting the Trespass Act would be “depriving those [Loyalists] who are subject to [the State], of the protection of government, it would amount to a virtual confiscation and banishment; for they could not have the benefit of the laws against those who should be aggressors.”<sup>73</sup> These passages are remarkable and challenge a whole host of assumptions Americans held regarding who should be protected by the law. Hamilton

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<sup>71</sup> Alexander Hamilton, “Letter from Phocion,” January 27, 1784, in *The Papers of Alexander Hamilton*, Harold Syrett and Jacob Cooke, eds., 27 vols. (Columbia: University of Columbia Press, 1957-1981), 3: 483-486.

<sup>72</sup> *Ibid.*, 485-487.

<sup>73</sup> *Ibid.*, 487.

called for a respect of individual rights for everyone, including those who had demonstrated support for England during the war. When his definition of liberty is coupled with his pleas for calm towards Loyalists, one sees the nascent origins of the shifting idea of virtue from the classical republican idea to the mixture of both republican and liberal characteristics.

As if these passages were not enough, Hamilton drove the point home near the end of his essay. Showing one the best early example of how individual rights could be coupled with placing the needs of the community before one's self, Hamilton noted

[v]iewing the subject in every possible light, there is not a single interest of the community but dictates moderation rather than violence. That honesty is still the best policy; that justice and moderation are the surest supports of every government, are maxims, which however they may be called trite, at all times true, though too seldom regarded, but rarely neglected with impunity. Were the people of America, with one voice, to ask, 'What shall we do to perpetuate our liberties and secure our happiness?' The answer would be, 'govern well' and you have nothing to fear either from internal disaffection or external hostility. Abuse not the power you possess, and you need never apprehend its diminution or loss. But if you make a wanton use of it, if you finish another example, that despotism may debase the government of the many as well as the few, you like all others that have acted the same part, will experience that licentiousness is the fore-runner to slavery.<sup>74</sup>

To reintegrate the Loyalists, Hamilton argued for a return to the first principles of republican government, which have virtue at their core. Notice how Hamilton relies on terms commonly associated with virtue: justice, vigilance, and moderation. But Hamilton went deeper, warning that republican government would descend into political slavery if individuals' rights were neglected or abused. This sentiment was reiterated with even greater force at the very beginning of the second "Letter from Phocion." Hamilton noted that

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<sup>74</sup> *Ibid.*, 495.



It is difficult for a man, conscious of a pure attachment to the public weal, who sees it invaded and endangered by such men, under specious but false pretences, either to think, or to speak of their conduct, without indignation. It is equally difficult for one, who in questions that affect the community, regards principles only, and not men, to look wit the indifference on attempts to make the great principles of social right, justice and honour, the victims of personal animosity or party intrigue.<sup>75</sup>

Hamilton could have stopped there with his argument on the necessity of allowing repentant Loyalists to live in peace with their American neighbors, but he did not. In his second essay, written in response to a critique by “Mentor,” Hamilton linked the reintegration of Loyalists to the economic benefit of the state and nation, expressing publicly what he had argued in private correspondence throughout 1783 and early 1784.<sup>76</sup>

Hamilton believed that excluding the Loyalists would hamper the economic development of the country. He based this fear on the idea that certain individuals, mainly those who support Loyalist suppression would take advantage of the disabilities leveled against the Loyalists and use it to exclude them from the market. Since great numbers of Loyalists fled, many of whom were either wealthy or skilled artisans, their absence from the market would be noticed and detrimental.<sup>77</sup> Linking this idea to the need to respect the rights of the individuals, Hamilton argued that the only way to insure a stronger, more vibrant economy was to protect the rights of Loyalists. Lifting the prohibitions against the Loyalists allowed people “who have better means” of carrying on trade to do so. It would also prevent the people from becoming a “tributary to the avarice

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<sup>75</sup> Hamilton, “Second Letter of Phocion,” in Hamilton, *Papers*, 3: 531-532. Also see 550-551.

<sup>76</sup> Isaac Ledyard, “Mentor’s Reply to Phocion, with Some Observations on Trade” (New York: Shepard Koldock, 1784), 1-18; Alexander Hamilton to Robert Morris, August 13, 1783; Hamilton to James Duane, August 5, 1783; Hamilton to Robert R. Livingston, August 13, 1783; Hamilton to James Duane, September 26, 1783; Hamilton to Gouverneur Morris, February 24, 1784; Hamilton to Robert Livingston, April 25, 1785, all in Hamilton, *The Papers of Alexander Hamilton*, 3: 132-144, 430-432, 458-459, 512-514, and 608-609.

<sup>77</sup> Hamilton, “Second Letter from Phocion,” 555.

of a small number . . . [who] would reap all its fruits even at the expense” of the rest of public.<sup>78</sup>

Hamilton’s discussion of rights and economy is a precursor to his later arguments as Secretary of the Treasury, in which he attempted to link individual interests with a stronger government. In the Phocion essays, however, Hamilton decried that some individuals were unable to pursue their own interest because of a violations of their rights. In other words, Hamilton, linking the idea of commonweal and individual interest, notes that the community suffers because a good number of citizens were legally deprived of serving their own economic interest.

Although Hamilton’s essays are the lengthiest and most reasonable argument for the economic benefit derived from the restoration and respect for Loyalists’ rights, it was not the only one. An anonymous essayist in the *Massachusetts Centinel* called for a peaceful return of the Loyalists for strictly economic reasons. The author noted Massachusetts’s serious cash shortage and its detriment to the state’s economic situation. One method to help alleviate the distress was to peacefully readmit the Loyalists. While admitting that debate over readmittance was a cause of “much division” in the state, the essayist still believed it beneficial to allow Tories to return. For him, the reasoning was quite simple: “the wealth [Loyalists] they bring will more than counterbalance the detriment they can possibly be of.”<sup>79</sup> A committee in New Haven, Connecticut, connected an easy reintegration with traits of kindness and justice but also linked

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<sup>78</sup> For New York’s economic situation in the 1780s see Forrest McDonald, *E Pluribus Unum: The Formation of the American Republic, 1776-1790* (Boston: Houghton Mifflin Co, 1965), 38-43 and Thomas C. Cochran, *New York in the Confederation: An Economic Study* (Philadelphia: University of Pennsylvania Press, 1932; reprint, Clifton, NJ: Augustus M. Kelly Publishers, 1972).

<sup>79</sup> Anonymous, *Massachusetts Centinel*, March 24, 1784.

prosperity with Loyalist reintegration. Although New Haven's economic situation was not desperate (the Committee believed it was on the verge of unprecedented growth) the Committee noted that with the peaceful return of Loyalists greater prosperity would result.<sup>80</sup>

The New Haven committee report was the culmination of a serious drive in that state to reintegrate Loyalists. Beginning a year earlier in 1783, and before the peace with England was official, numerous Connecticut towns engaged in serious discussions on whether to accept or reject returning Tories. Like the rest of the nation, there were towns that refused to accept Loyalists. Not surprisingly, those unwelcoming towns based their decisions on the assumptions that Loyalists were without virtue and, because of their adherence to tyrannical government, threatened the very foundations of republican government.<sup>81</sup> Advocates for returning Loyalists employed several lines arguments in attempting to persuade their townsmen and state legislature, including the arguments put forward by Rush and Burke: that anti-Loyalist laws were repugnant to liberty and a policy of mercy and forgiveness should prevail regarding Loyalists.<sup>82</sup> The primary argument of pro-reintegration forces in Connecticut, however, was the economic benefit of reintegrating Loyalists once a restoration and respect for their rights occurred. As a "Friend to Prudence" contended, Loyalists possessed economic connections with various

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<sup>80</sup> "A Town Meeting held in New Haven," *Connecticut Journal*, March 10, 1783.

<sup>81</sup> See the essays by "A Freeman," in the *Connecticut Courant*, April 1, 1783; "Philanthropus," in *Connecticut Gazette*, April 4, 1783. The standard work on Connecticut's attempt to reintegrate Loyalists remains Oscar Zeichner, "The Rehabilitation of Loyalists in Connecticut," *New England Quarterly* 11 (1938): 308-330. Also useful is David Villers, "Loyalism in Connecticut, 1763-1783" (Ph.D. dissertation, University of Connecticut, 1976).

<sup>82</sup> "A Spectator" in *Connecticut Gazette*, May 9, 1783, in which he labeled the Massachusetts' Act of Banishment "impolitic, unjust, and cruel." This language is nearly exact of that used by Rush and Burke. Also see the newspaper battle over the confiscation and readmittance of former Loyalists, Richard Smith. See *Boston Gazette*, March 31, 1783; *Connecticut Gazette*, March 28, 1783, April 4, 18, 25, 1783, and May 9, 1783.

European merchants. Were Connecticut to repeal anti-Loyalists laws and allow the Loyalists to live in peace, the state would flourish and even rival the economic hubs of New York, Rhode Island, and Massachusetts.<sup>83</sup>

The arguments of essayists and the resolutions of town committees were effective in achieving their goal of having Connecticut's anti-Loyalists laws repealed and peaceful return of the Loyalists, as, by 1787, all anti-Tory laws were repealed.<sup>84</sup> Although historian Oscar Zeichner claims that the opposition to reintegration in Connecticut towns simply and inexplicably dissipated, what appears more likely is that the ideological debate caused a shift in opinion allowing for recognition and respect for former Loyalists' rights, which, in turn, allowed for a more peaceful co-existence.<sup>85</sup>

While Connecticut debated whether to accept returning Loyalists, New Jersey waged its own struggle over the question of returning Tories. The similarities between the two states' arguments over reintegration are striking. Like Connecticut, New Jersey found itself divided over whether to accept former Loyalists. The anti-Loyalist forces in New Jersey, just like their Connecticut counterparts, argued that their state would suffer serious civil and political discord should the adherents of tyranny be allowed residence. The pro-reintegration forces countered by calling for a repeal of all anti-Tory laws and a calm transition for returning Loyalists. As with Hamilton and the essayists and town committees of Connecticut, the pro-reintegration group argued that the economic benefit of returning Loyalists far outweighed any potential harm they could do.

In essays published in *The New-Jersey Gazette* and *The Political Intelligencer*, "Mercator," "A Son of Liberty," and "Candidus" all pleaded that restoring the individual

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<sup>83</sup> "A Friend to Prudence," *Connecticut Gazette* May 30 and June 6, 1783.

<sup>84</sup> Zeichner, "The Rehabilitation of Loyalists in Connecticut," 330.

<sup>85</sup> *Ibid.*

rights of Loyalists would help to bring economic prosperity to the state.<sup>86</sup> By repealing the oppressive measures against Tories and allowing them to settle peacefully in their state, wrote “A Son of Liberty,” New Jersey had its “only opportunity . . . [of] inviting the wealthy and opulent” which would lead to the “enriching of its inhabitants.” Citing Connecticut’s attempts to bring wealth to the state via peaceful reintegration, the essayist pleaded with the New Jersey legislature to do “something to expedite this affair” and allow New Jersey to flourish. What the “Son of Liberty” wanted the legislature to do was clear: repeal all anti-Loyalists laws and permit a decent respect of their rights.<sup>87</sup> While “A Son of Liberty” was implicit in his linkage between respect for individual rights of Loyalists and the economic marketplace, his compatriot, “Candidus,” was explicit in his connection between the two. He noted that if New Jersey could put aside its war time resentment of Loyalists and passed an act of amnesty and oblivion that would restore the rights of former Loyalists, the “principal part of the citizens,” who would enter New Jersey would be merchants and with their entrance would come wealth and prosperity. To those advancing the idea that returning Loyalists could be a source of potential danger, “Candidus” argued it is actually the loss of rights was the threat. “The differences of government,” he wrote, “are not essential to mean, as the difference in the enjoyment of their natural rights.”<sup>88</sup> In other words, the real threat does not come from the Loyalist’s former attachment to England but, instead, from the continual denial of their rights. “Candidus” concluded his essay by noting that “The opportunity is now offered to New Jersey, if she will take the advantage of the heat and violence of opinion

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<sup>86</sup> “Mercator,” *The New-Jersey Gazette*, June 4, 1783; “A Son of Liberty,” *The Political Intelligencer and New-Jersey Advertiser*, April 6, 1784; “Candidus” *The Political Intelligencer and New-Jersey Advertiser* April 14 and 21, 1784.

<sup>87</sup> “A Son of Liberty,” *The Political Intelligencer and New-Jersey Advertiser*, April 6, 1784.

<sup>88</sup> “Candidus,” *The Political Intelligencer and New-Jersey Advertiser* April 14 and 21, 1784.

in other states, and draw over to herself the right and wealthy of other places that this state, which has been in point of commercial consequence, may lift her head equal with any. As these people have not offended against our particular laws, I can see no legal objection to their reception.”<sup>89</sup> While New Jersey’s effort to reintegrate the Loyalists was more difficult than that of Connecticut – in part because New Jersey witnessed significantly more action during the Revolution – Loyalists there did eventually settle peacefully.

New Jersey and Connecticut’s actions, together with that Hamilton’s essays, mark the culmination of the ideological struggle to reintegrate the Loyalists. This ideological debate had its origins during the Revolution, when Patriots based their condemnation of Tories on the classical republican ideas of commonwealth and a soon-to-be-outdated meaning virtue. Patriots argued that the Loyalists, because of their continued support of England, placed their own interest above that of their community, and, consequently, lacked the virtue needed for republican government. A strong element of this republican thought also held that uniformity of opinion was of the utmost importance, which naturally resulted in intolerance of dissenting political views. It was these beliefs that help explain the actions taken against Loyalists during and after the war. Although these arguments persisted after the Revolution, there were some who challenged this prevailing ideological orthodoxy and called for the peaceful reintegration of Loyalists. These challengers accepted a great deal of classical republican argument. What they did, however, was modify the idea of republicanism. Virtue remained important but it was no longer the sole component necessary for republican government; instead, these supporters of Loyalists and other dissenters began to advocate individual rights as a cornerstone of

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<sup>89</sup> *Ibid.*

republican government. In order to respect these rights, moreover, the community needed to embrace the a new sort of virtue required for stable government as well as tolerate members of the body politic who were once considered inimical to very liberty the Revolution was fought to defend. Not only did these advocates call for a respect of Loyalists rights, but efforts made by Connecticut and New Jersey to actively advertise for Loyalists to return made a direct link between toleration and the restoration of their rights with the economic benefit of having a peaceful co-existence. This change was a necessary and important development in the reintegration of Loyalists, and marked yet serious step towards making Loyalists into republican citizens.

## Chapter 6

### From Custom to Command: The Enactment and Repeal of Anti-Loyalist Legislation, the Limits of Popular Sovereignty, and the Reintegration of the Loyalists, 1774-1790

The ideological struggle to reintegrate the Loyalists was only a single battle in a larger campaign. Although significant, attempting to gain an intellectual respect for Loyalists' rights was not enough for Loyalists to reintegrate; pro-reintegration Patriots had to translate a change of mind into tangible results. Where they accomplished these results was in the repeal of anti-Loyalist legislation states passed during the war. This chapter examines the enactment and repeal anti-Loyalist legislation passed during and after the War. Although historians have examined these statutes in terms of what they said and the punishment offered for offenders, they have failed to explore the assumptions underlying these laws.<sup>1</sup> What is more, historians have neglected to notice how these laws represent a transition in colonial-American concept of the law from a common-law tradition of custom, justness, with limited legal coercion and enforcement to a more modern conception of law as the command of the sovereign. Historians have also failed to notice how the notion of popular sovereignty, the idea that ultimate political power resided in the people, allowed legislatures to enact the measures. Thus, the concept of popular sovereignty was more excessive and potentially dangerous than Americans believed possible before the Revolution. The main focus of this chapter will demonstrate how these developments in the concept of the law and popular sovereignty

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<sup>1</sup> These laws are noted in Claude H. Van Tyne, *The Loyalists in the American Revolution* (New York: MacMillan, 1902; reprint, New York: Peter Smith, 1953) and discussed on pages 190-212; James Westfall Thompson, "Anti-Loyalist Legislation during the American Revolution," *Illinois Law Review* 3 (1908-1909): 81-90, 147-171.



were a great detriment to Loyalists because of their service as the foundation for legal coercion, exclusion, and persecution. Only after the war, when some Patriots began calling for an ideological respect of Loyalists' rights did American opposition to this newer idea of the law emerge. Wanting to curb the extremes of these laws and allow Loyalists to return, opponents forced a greater adherence to legislative limitations via written constitutions and bills of rights. Not only calling for repeal of the anti-Tory laws and for a stricter adherence to constitutions, opponents of anti-Loyalist legislation also called for a limitation on popular sovereignty. When state legislatures repealed these laws, they often acted contrary to public demands, forcing their own limitation on popular sovereignty. Thus the process of reintegrating Loyalists required the limiting of legislative command and popular sovereignty.

#### **Anglo-American Conception of the Law to 1774**

Before examining the anti-Loyalist legislation, the status and concept of the law in pre-Revolutionary America must be considered. Many early American historians have misunderstood the context of eighteenth-century law. According to legal scholar John Phillip Reid, too often historians "confuse the political with the legal" thus failing to note the tremendous "all pervasive and highly central role in the politics of pre-Revolutionary America" that law played.<sup>2</sup> The main mistake American historians have made regarding

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<sup>2</sup> John Phillip Reid, "In an Inherited Way: English Constitutional Rights, the Stamp Act Debates, and the Coming of the American Revolution," *California Law Review* 49 (1975-1976): 1109-1129; "In Legitimate Stirps: The Concept of 'Arbitrary,' the Supremacy of Parliament, and the Coming of the American Revolution," *Hofstra Law Review* 5 (1976-1977): 459-499; *In Defiance of the Law: The Conditions of Law in Massachusetts Bay, the Irish Comparison, and the Coming of the American Revolution* (University Park, PA: Pennsylvania State University Press, 1977); and "The Irrelevance of the Declaration" in Hendrick Hartog, ed., *Law in the Revolution and the Revolution in the Law* (New York: New York University, 1982), 48. See also Thomas C. Grey, "Origin of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought," *Stanford Law Review* 30 (1978): 843-893; Jack P. Greene, *Peripheries and Center: Constitutional Development in the Extended Politics of the British Empire and the United States, 1607-1788* (Athens: University of Georgia Press, 1986); David N. Mayer, "The English Radical Whig

Anglo-American law results from understanding a modern conception of the law as “nothing but the command of the sovereign” to describe law and legal institutions of the eighteenth century.<sup>3</sup> The result of this confusion has been to bestow “eighteenth-century law with greater coercive power than it possessed.”<sup>4</sup>

English law in the seventeenth century was “not the commands of the sovereign, but [was], in fact, the sovereign itself.”<sup>5</sup> Not only was the law itself sovereign, but it was also the ultimate check upon authority, especially arbitrary authority and coercion. To seventeenth- and eighteenth-century Englishmen (including Americans), the law set the boundaries within which the legislature and the executive could function. It limited the power of command wielded by these two branches of government. Thus, when any function of government violated the law or exceeded the boundary of the law, that body had acted arbitrarily.<sup>6</sup>

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Origins of American Constitutionalism,” *Washington University Law Quarterly* 70 (1992): 131-208; Mary Sara Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (Cambridge: Harvard University Press, 2004); and Daniel J. Huselbosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664-1830* (Chapel Hill: University of North Carolina Press, 2005). A good summary of the corpus of work is Jack P. Greene, “From the Perspective of the Law: Context and Legitimacy in the Origins of the American Revolution,” in Jack P. Greene, ed., *Interpreting Early America: Historiographical Essays* (Charlottesville: University Press of Virginia, 1996), 467-492.

<sup>3</sup> The quote is actually from Hendrick Hartog, “Losing the World of the Massachusetts Whig,” in *Law in the Revolution*, 147, although it could just as easily come from Reid; Reid, “Irreverence of the Declaration,” 60. A still relevant discussion is Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (Ithaca: Cornell University Press, 1940).

<sup>4</sup> *Ibid.*

<sup>5</sup> John Phillip Reid, “In the Taught Tradition: The Meaning of Law in Massachusetts-Bay Two-Hundred Years Ago,” *Suffolk University Law Review* 14 (1980): 933; *The Rule of Law: The Jurisprudence of Liberty in the Seventeenth and Eighteenth Centuries* (DeKalb: Northern Illinois University Press, 2004) and *The Ancient Constitution and the Origins of Anglo-American Liberty* (DeKalb: Northern Illinois University Press, 2005).

<sup>6</sup> *Ibid.*

This concept of the law, however, should not be confused with constitutionalism.<sup>7</sup> Although some similarities exist, they are different ideas. To early modern Englishmen, constitutionalism was the idea of a limited government and the security of rights. These two ideas worked in tandem with one another, because since the constitution was a limited government, it actually secured rights. As John Dickinson noted during the Stamp Act crisis, “a constitution is the organization of the contributed rights in society. Government is the exercise of these [rights]. It is intended for the benefit of the governed; of course [it] can have no just powers but what conduce to that end.” In other words, any exercise of authority beyond what were recognized as English rights was in violation of the constitution.<sup>8</sup> Furthermore, the English constitution was not a written document; it was, instead, custom, principle, precedent, and what was considered naturally right. As John Adams noted, to be “perceived as constitutional was argued in terms of principle, parity, doctrine, continuity, disinterest, and ‘right.’”<sup>9</sup> When the law and the constitution are coupled, when any actions moved beyond the restraining of power of the law, by empowering a branch of government to force action instead of restrain authority, it violated the principles of the constitution.<sup>10</sup>

The implementation of these constitutional and legal principles in the actual practice of the law reflected the fundamental idea that law limited authority. This limited

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<sup>7</sup> See for example Gordon Wood, *Creation of the American Republic, 1776-1787* (Chapel Hill: University of North Carolina Press, 1969), 261-305. In his seminal work, Wood commits the mistake that legal historians claim plagues early American scholarship in that when he is discussing American law, what he is really examining is the constitutionalism of the period.

<sup>8</sup> Quote is from John Phillip Reid, *Constitutional History of the American Revolution*, abridged ed. (Madison: University of Wisconsin Press, 1995), xix.

<sup>9</sup> John Adams, “Novangulas,” No. III in C. Bradley Thompson, ed. *The Revolutionary Writings of John Adams* (Indianapolis: Liberty Fund, 2000), 163-168. Quote is from John Phillip Reid, *Constitutional History of the American Revolution*, abridged ed. (Madison: University of Wisconsin Press, 1995), xix.

<sup>10</sup> John Adams, “The Earl of Clarendon to William Pym” No. III, in Thompson, ed. *Revolutionary Writings of John Adams*, 54-56.

authority is demonstrated in the lack of coercive capacity governmental institutions possessed at the time of the American Revolution.<sup>11</sup> In Massachusetts, which would later become a hotbed of Revolutionary fervor, some residents even questioned whether the General Court even possessed the authority to enact any legislation. In fact, the “most intense concern” for pre-Revolutionary American law was “to restrain governmental power and to render individuals secure in their lives, liberties and properties.”<sup>12</sup> Because of this concern, governmental entities possessed little, if any, real coercive power, a fact that was made all-too noticeable during the mob actions of the 1760s and 1770s.<sup>13</sup>

Although limited in authority, one governmental body in pre-Revolutionary America possessed some degree of authority: the courts. They were the only entity possessing true coercive power in that they could fine or punish individual wrongdoing. This is not to say that the courts wielded arbitrary power; the American colonists, steeped as they were in English law, custom, and republicanism would have had none of it. Colonial legislatures, especially in the eighteenth century attempted, with varying degrees of success, to deprive “judges of all discretion in administering their vast powers and of effective ability to bring those powers to bear upon individuals.”<sup>14</sup> Along with legislative action, moreover, the judicial system itself curtailed its own authority because custom and precedent dominated and guided judges’ actions. But the most persistent limitation on judicial authority in pre-Revolutionary America was the ability of juries to act with

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<sup>11</sup> William Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830* (Athens: University of Georgia Press, 1975), 1-35.

<sup>12</sup> *Ibid.*, 13.

<sup>13</sup> This is the general thesis of Hiller Zoble, *The Boston Massacre* (New York: Norton, 1970).

<sup>14</sup> Nelson, “The Legal Restraint of Power in Pre-Revolutionary America: Massachusetts as a Case Study, 1760-1775,” *American Journal of Legal History* 18 (1974): 10.

wide discretion in both civil and criminal cases.<sup>15</sup> One of the reasons juries were so important to pre-Revolutionary America was their ability to find both law and facts in civil and criminal cases. Possessing this power further limited the authority of judges.

The power of juries to determine the law – a power that historian William E. Nelson describes as “virtually unlimited” – reflected four points. First, judges in pre-Revolutionary America possessed little law-making power, a power that in the nineteenth century would become a sacred cow of American jurisprudence.<sup>16</sup> Second, jurors, the “representatives of local communities[,] . . . generally possessed effective power to control the content of the province’s substantive law.” Third, juries could also either reject or adhere to common-law traditions, depending on whether the common law precedents conflicted with the jury’s notion of morality, justice, or the needs and circumstances of the community. Finally, the power of juries also demonstrates the pervasiveness of the law in Anglo-American culture. Historians often overlook, or take for granted, the degree to which both Anglo-Americans were steeped in a basic understanding of the English constitution and the way they served as one of main foundations of English identity. The only other institution that served as a greater source for cultural identification was religion. John Adams aptly noted the pervasiveness of the English constitution: “the great Principles of the Constitution, are intimately known, they are sensibly felt by every Briton – and it is scarcely extravagant to say, they are drawn in

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<sup>15</sup> Thomas Jefferson, *Notes on the State of Virginia*, David Waldstreicher, ed. (New York: Bedford, 2002), 168-169; J. R. Pole, “Reflections on American Law and the American Revolution” *William and Mary Quarterly* 50 (Jan. 1993): 123-159, offers a more equivocal argument about the role of juries in pre-Revolutionary America. Shannon Stimson, *The American Revolution in the Law: Anglo-American Jurisprudence before John Marshall* (Princeton: Princeton University Press, 1990); and Daniel D. Blinka, “Trial by Jury in Revolutionary Virginia: Old-Style Trials in the New Republic” (Ph.D. dissertation, University of Wisconsin, 2001).

<sup>16</sup> Nelson, *Americanization of the Common Law*; and chapter 1 of Morton J. Horowitz, *The Transformation of American Law, 1780-1860* (Cambridge: Harvard University Press, 1977).

and imbibed with the Nurses milk and first Air.” All four of these factors were not only of great import when the Revolution came, but they were also challenged by the change in the conceptual understanding of the law as demonstrated by anti-Loyalist legislation.<sup>17</sup> These factors also demonstrate some of the irony the persecution of Loyalists brought to American Revolution. Although the four factors describe the importance of juries to pre-Revolutionary America, with the changing concept of the law and how it enabled states to persecute Loyalists, one of the main methods of legal punishment was to deprive Loyalists of jury trials or to sit on juries.

Depriving Loyalists of jury trials or serving on juries further demonstrates how the conceptual change in the law allowed state to punish Loyalists. To Englishmen and colonial Americans, alike the importance of juries extended well beyond the ability to limit authority. In fact, most colonial Americans considered the limiting capabilities of juries to be secondary to the idea that the jury was the bedrock of liberty. All Americans, both Patriot and Tory, understood juries as being of the utmost importance in the maintenance and security of liberty. During the height of the Stamp Act crisis in 1765, the Maryland colonial legislature noted “that Tryals by Juries is the Grand Bulwark of Liberty the undoubted Birthright of every Englishman and Consequently of every British Subject in America.” Nine years later, the First Continental Congress, in its attempt to woo Quebec to join the American protests, argued that a jury

provides, that neither life, liberty nor property can be taken from the possessor, until twelve of his unexceptionable countrymen and peers, of his vicinage, who from that neighbourhood may reasonably be supposed

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<sup>17</sup> Nelson, *Americanization of the Common Law*, 15-18; John Adams, Diary entry for January 10, 1771, in *Diary and Autobiography John Adams*, Herbert Butterfield, ed., 4 vols. (Cambridge: Harvard University Press, 1961), 2: 2-5, quote on 5; J.C.D. Clark, *The Language of Liberty 1660-1832: Political Discourse and Social Dynamics in the Anglo-American World* (Cambridge: Cambridge University Press 1994), 1-10.

to be acquainted with his character, and the characters of the witnesses, upon a fair trial, and full enquiry fact to fact, in open court, before as many of the people as chuse to attend, shall pass their sentence upon oath against him; a sentence that cannot injure him, without injuring their own reputation, and probably their interest also; as the question may turn on points, that, in some degree concern the general welfare; and if it does not, their verdict may forma precedent, that, on a similar trial of their own, may militate against themselves.<sup>18</sup>

Thus by removing jury trials or the right to sit on juries, Patriots stripped Loyalists of one of the key ingredients of English identity and liberty.

Along with their reliance and celebration of juries, and a limited, restrained government, the colonies possessed little in the way of a bureaucracy or police force. While England was in midst of its rise as a fiscal-military state, the colonies maintained the older, more traditional norm of small government, and even smaller number of officials.<sup>19</sup> Because of the lack of any enforcement agency, the implementation of the law fell to the juries. As Nelson observes, “the only way for officials to ensure enforcement of the law was to obtain community support for the law, and the best way to obtain that support was to permit local communities to determine the substance of the law, through legal institutions such as the jury.”<sup>20</sup> In a somewhat obscure way, Nelson alludes to exactly what Reid and others have argued: that law in pre-Revolutionary America was not the command of the sovereign but was itself sovereign.

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<sup>18</sup> “The Maryland Resolves, September 28, 1765,” in Edmund Morgan, ed., *Prologue to Revolution: Sources and Documents on the Stamp Act Crisis, 1764-1766* (Chapel Hill: University of North Carolina Press, 1959), 52-53; “Address to Quebec, October 26, 1774, Worthington C. Ford, ed., *Journal of the Continental Congress, 1774-1789*, 19 vols. (Washington, D.C.: Government Printing Office, 1904-1937), 1:108. The Continental Congress issued this Address in response to the Quebec Act that deprived the Quebec Territory of trials by jury.

<sup>19</sup> John Brewer, *The Sinews of Power: War, Money, and the English State, 1688-1783* (Cambridge: Harvard University Press, 1990).

<sup>20</sup> Nelson, *Americanization of the Common Law*, 21; quote is from “Legal Restraints on Power,” 31-32.

### **Development of Parliamentary Superiority and its Rejection by Americans**

The concept of the common law tradition was dominant in England until the Glorious Revolution of 1688.<sup>21</sup> With the ascension of William and Mary and the passage of the English Bill of Rights, the Septennial Act, the Financial Settlement, and the Act of Settlement, the Parliament, not King, became the dominant factor in English politics and constitutional development. Throughout the eighteenth century, and especially after the crowning of the Hanoverians, Parliament's role as the dominant entity in the English system became irrevocably ensconced.<sup>22</sup>

Parliament's new supremacy had serious and permanent repercussions for the English constitution. Never a written document (with the exception of the Instrument of Government during England's brief flirtation with a republic in the mid-seventeenth century), English constitutional thought adhered to customs and traditions and statutes with an emphasis on the rule of law. To be sure, Englishman considered certain constitutional institutions and forms sacrosanct – primarily the jury, the right of consent to taxation, and the right of habeas corpus – and protected in documents such as the Magna Carta.<sup>23</sup> Before the eighteenth century, however, Englishmen held to a constitutional ideology of custom and precedent which maintained a belief in the sovereignty in the law. From the idea espoused by Lord Bracton in the mid-thirteenth century that the “King is not above the Law, the Law is King” to the marshalling of

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<sup>21</sup> The standard work on this topic remains J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge: Cambridge University Press, 1958).

<sup>22</sup> Greene, *Peripheries and Center*, 57-58, 115.

<sup>23</sup> Article Fifty-Two of Magna Carta. A.E. Dick Howard, *The Road from Runnymede: Magna Carta and Constitutionalism in America* (Charlottesville: University Press of Virginia, 1968); Lois Schwoerer, “Law, Liberty, and Jury Ideology: English Transatlantic Revolutionary Traditions,” in Michael Morrison, ed., *Revolutionary Currents: Nation Building in a Transatlantic World* (New York: Rowman-Littlefield, 2004), 35-64.



common law precedents by Edward Coke, and, finally, to the English Civil Wars with the Stuart dynasty, Englishmen had long cherished this idea of law as a limiting authority upon power.<sup>24</sup>

With the James II's abdication of the throne in 1688, however, this commitment to the traditional constitution was overthrown and a new constitutional order ascended. Unlike the previous commitment to tradition and custom, the new arrangement placed Parliament in control of the constitutional mechanisms. Although the long-term ramifications of this change were unforeseen in 1688, over a period of sixty years, Parliament transformed itself from being one part of the English constitutional arrangement to becoming, in fact, the constitution itself. It was Parliament's will that became law and its commands that required obedience. Providing the clearest expression and defense of this new order was William Blackstone.<sup>25</sup> In the first volume of his *Commentaries on the Laws of England*, the English jurist provided a detailed explanation of "The Nature of the Law in General." Blackstone defined the law as being "that rule or action, which is prescribed by some superior, and which the inferior is bound to obey."<sup>26</sup>

What Blackstone claimed with his definition was that the law is the command of the sovereign. When compared with the definition of the law offered earlier by Bracton, Blackstone's positivist definition of command was a striking departure from the

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<sup>24</sup> Henry Bracton, *On the Laws and Customs of England*, trans. Samuel Thorne, 2 vols. (London: n.e, 1268; reprint, Cambridge: Harvard University Press, 1968-1977), 2: 25; Sir Edward Coke, John Phillip Reid, *The Constitutional History of the American Revolution*, 4 vols. *The Authority of Rights*, vol. 1 (Madison: University of Wisconsin Press, 1986) and *The Ancient Constitution and the Origins of Anglo-American Liberty*; David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* (Cambridge: Cambridge University Press, 1989), 1-55; James R. Stoner, *Common Law and Liberal Theory: Coke, Hobbes, and the Origins of American Constitutionalism* (Lawrence: University Press of Kansas, 1992), 11-134.

<sup>25</sup> Blackstone certainly was not the only advocate. Also of great importance, but not discussed here, was Henry Mansfield.

<sup>26</sup> William Blackstone, *Commentaries on the Laws of England*, 4 vols., Stanley Kurtz, ed. (Oxford: The Clarendon Press, 1765; reprint, Chicago: University of Chicago Press, 1979), 1: 39.

traditional, negative definition in which law controlled legislatures and not vice versa.<sup>27</sup>

Whereas Bracton, Coke, and other pre-eighteenth century jurists viewed the law as the superior entity, Blackstone, guided by the events of post 1688 England, inverted this view. In many ways, too, Blackstone's definition is loaded with irony. The purpose of Blackstone's *Commentaries* was to distill the increasingly unwieldy common law into its more salient and pertinent points. This distillation could be seen as being rendered somewhat unnecessary or even moot if, according to Blackstone himself, the law was nothing more than "what is proscribed by a superior, and which the inferior is bound to obey." This irony is furthered because Blackstone's influence in England increasingly waned during the late-eighteenth and early nineteenth century.<sup>28</sup> By the time John Austin published his work of legal philosophy in early Victorian England, Blackstone's work was noted only for its deficiencies while his positivist definition of the law was Austin's unacknowledged lodestone.<sup>29</sup>

Blackstone's influence on American law in the early nineteenth century is unquestioned, while his influence on the Revolutionary generation is suspect.<sup>30</sup> To be sure, American's repeatedly cited Blackstone's work throughout the imperial crisis, but numerous references does not necessarily translate into positive influence. In fact, Thomas Jefferson deplored the teachings of Blackstone, labeling them "the honey

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<sup>27</sup> John Phillip Reid, *Constitutional History of the American Revolution*, abridged ed., 22.

<sup>28</sup> Not only is this irony found in the fundamental purpose of the work, but as David Lieberman has argued, there are various passages throughout all four volumes of the *Commentaries* where Blackstone chastises Parliament for meddling with the Common Law. Lieberman, *The Province of Legislation Determined*, 56-68.

<sup>29</sup> John Austin, *Lectures on Jurisprudence, or, The Philosophy of Positive Law* (London: J. Murray, 1873) and *The Province of Jurisprudence Determined* (London: John Murray, 1832; reprint: Amherst, NY: Prometheus Books, 2000).

<sup>30</sup> Ellen Holmes Pearson, "'A Difference of Customs': Sir William Blackstone's *Commentaries on the Laws of England* and Transformations of the Common Law in America, 1771-1830" (Ph.D. dissertation, The Johns Hopkins University Press, 2000).

Mansfieldism” of Toryism.<sup>31</sup> Indeed, if Blackstone did have an influence during the Revolution, it certainly was not from his definition of the law.<sup>32</sup> In fact, the American colonies in the years before the Revolution rejected both outright and implicitly, this Blackstonian understanding of the English constitution. Two notable examples of this rejections come from the American reactions to the passage of the Declaratory Act in 1766, which asserted that Parliament could legislate for the Colonies in “all cases, whatsoever” and the 1774 Coercive, or Intolerable, Acts the punitive measures against Massachusetts in response to the Boston Tea Party.

Passed in response to the repeal of the Stamp Act in 1766, “The Declaratory Act” was among the starkest statements of Parliamentary authority and supremacy.<sup>33</sup> But, for Americans who adhered to the older constitutional tradition, the Act was “without legal substance” because, unlike the Stamp Act and future Coercive Act, the measure had no “enforcement to prevent.” Refusal to officially acknowledge the Declaratory Act makes sense when it is remembered that Americans adhered to an idea of the law as a restraint upon authority. The Declaratory Act, moreover, was nothing more than a statement of an idea; to protesting the Act would acknowledge the principal of Parliamentary supremacy as fact and not just the postulation. Again, because of their adherence to custom, making the Act a legal reality would have forced Americans to make Parliamentary supremacy

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<sup>31</sup> Thomas Jefferson to James Madison, February 17, 1826 in James Morton Smith, ed., *Republic of Letters: The Correspondence between Thomas Jefferson and James Madison, 1776-1826*, 3 vols. (New York: Norton, 1995), 3: 1964-1966, quote on 1965.

<sup>32</sup> What I am contending here is that Blackstone’s definition of the law was not influential; it was, in fact, either ignored or outright denounced, as in the case of Jefferson.

<sup>33</sup> The measure can be found in Bruce Frohnen, ed., *American Republic: Primary Sources* (Indianapolis: Liberty Fund, 2002), 135.

part of the colonial constitutional order.<sup>34</sup> Thus, Americans rejected any notion of Parliamentary supremacy.

Whereas Americans had to ignore the Declaratory Act in order for it not to become part of the customary constitution, no such application could be done with the Coercive Acts; colonials had no choice but to address the measures. The American protest against the Coercive Acts, which they called the “Intolerable” Acts, focused on the argument that the measures were arbitrary. Having escaped the constitutional vernacular of the twenty-first century, the concept of arbitrary government was one familiar and feared by eighteenth-century Americans. What it meant was the naked use of legislative power without any check upon its authority by other forces such as custom, law, and constitutionalism. Arbitrary government was, in essence, the antithesis of customary government, because it could, upon whim, remove or destroy long held rights and traditions.<sup>35</sup> In other words, arbitrary government supplanted itself as the sovereign and commander of law.

Since the measures shut the port of Boston, all but abolished the 1691 Massachusetts Charter, established Vice-Admiralty Courts, held trials away from the areas in which they occurred, and forced the quartering of troops in subject’s homes, it

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<sup>34</sup> This argument follows closely Reid, *Constitutional History of the American Revolution*, abgd ed., 50; Reid, *Constitutional History of the American Revolution*, vol. 4: *The Authority of the Law* (Madison: University of Wisconsin Press, 1993), 1-69, 43-52 particularly. Edmund Morgan, *The Stamp Act Crisis: Prologue to Revolution* (Chapel Hill: University of North Carolina, 1953); Morgan, “Colonial Ideas of Parliamentary Power, 1764-1766” *William and Mary Quarterly* 5 (July 1948): 311-341; Barbara Black, “The Constitution of Empire: The Case for the Colonists” *University of Pennsylvania Law Review* 124 (1976): 1157-1211; Grey, “Origin of the Unwritten Constitution.”

It is important to note that the American rejection of the Declaratory Act was an official ignoring of the Act, meaning that no elected or selected body – as in the Stamp Act Congress or, later, the Continental Congress – passed a resolution condemning the Act. Otherwise, the Declaratory Act was harshly condemned as another example of the growing tyranny of Parliament. In a charge to a South Carolina jury, William Drayton noted that “under the color of the law” Parliament was attempting to implant arbitrary government. In a list of objectionable measure the first he mentioned as the Declaratory Act.

<sup>35</sup> Reid, “In Legitimate Strips;” and *The Authority of Law*, 27-42.

was no wonder Americans viewed these acts as the purest form of arbitrary government. Because of the colonial beliefs in customary and the restraining nature of law, furthermore, the Americans were correct in their argumentation.<sup>36</sup> This argument was made even more tangible because although these acts were aimed only at Massachusetts, all Americans feared that such extreme and illegal measures would be visited upon them.<sup>37</sup>

### **The American Development of Popular Sovereignty**

Sovereignty is the idea that political power must have a higher, superior, and final authority from which there is no appeal.<sup>38</sup> Not until the showdown between Parliament and Charles I in the 1620s did Englishmen begin to consider where sovereignty resided in the English constitution; it was always assumed that the law was sovereign.<sup>39</sup> After 1688, the debate over sovereignty resolved itself in Parliament's favor. While Americans recognized Parliament's supremacy over the King (or, rather, the concept of king-in-parliament), they nonetheless still adhered to the older, pre-Glorious Revolution idea of a customary constitution. In many ways, it is as if the Glorious Revolution left no constitutional mark upon America, leaving unanswered the question of sovereignty over the colonies.

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<sup>36</sup> Part of the main thesis of Reid's prolific work on the Revolutionary period is the idea of a dual constitution. On one side, the English Parliament and their belief in their supremacy and on the other are the Americans who still held to the pre-1688 notions of custom and common law. What Reid contends with persuasiveness is that both sides were right in their own constitutional arguments and the Imperial Crisis of 1765-1775 demonstrated how each side had constitutionally diverged from each other.

<sup>37</sup> David Ammerman, *In the Common Cause: American Response to the Coercive Acts of 1774* (New York: Norton, 1974), 15.

<sup>38</sup> Bertrand de Jouvenel, *Sovereignty: An Inquiry to the Political Good* (Chicago: University of Chicago Press, 1957; reprint, Indianapolis: Liberty Fund, 1998).

<sup>39</sup> Edmund Morgan, *Inventing the People*, 13-121; Mayer, "The English Radical Whig Origins," 141-160; Reid, *The Ancient Constitution*; Pocock, *The Ancient Constitution*; F. W. Maitland, *A Constitutional History of England: A Course of Lectures Delivered by F. W. Maitland* (Cambridge: Cambridge University Press, 1908), 298-302.

Not until the American Revolution did the issue of sovereignty over the colonies come to the fore.<sup>40</sup> In their debate with Parliament, Americans not only rejected Parliamentary sovereignty, but substituted their own idea as to where the foundation of sovereignty resided: in the people themselves. Many seventeenth-century English constitutional thinkers, from Coke through Locke, contended that “the people” formed the foundation of the English government but this idea, as Edmund Morgan pointed out, was more a legal fiction than reality, a use of polemics to win an argument more than any real belief or adherence.<sup>41</sup> With the advent of the American Revolution, however, Americans argued that all political authority flowed from “the people,” thus turning themselves into a “constituent power” with all government functions resting on the consent of the governed.<sup>42</sup> Unlike the English’s lip-service to the people being the source of authority, Americans truly believed in popular sovereignty and did not hesitate to express those ideas. A Pittsfield, Massachusetts petition stated, “In free states the people are the fountain of power,”<sup>43</sup> while a committee of mechanics in New York City petitioned the New York legislature to adopt a constitution because, as they put it, “every man . . . is, or ought to be, by inalienable right, a co-legislator with all the other members

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<sup>40</sup> The best example of this is James Otis, “Rights of the Colonies Asserted and Proved” 1761 in Frohen, ed., *American Republic*, 119-134.

<sup>41</sup> Edmund Morgan, *Inventing the People*, 55-78.

<sup>42</sup> *Ibid.*; Wood, *Creation of the American Republic*, 363-372; Bernard Bailyn, *The Ideological Origins of the American Revolution*; Robert R. Palmer, *The Age of the Democratic Revolution: A Political History of Europe and America, 1760-1800* 2 vols, (Princeton: Princeton University Press, 1959), 1: 213-238; Morris, *The Forging of the Union*, 115-116; Willi Paul Adams, *The First State Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* (Chapel Hill: University of North Carolina Press, 1979; reprinted, expanded ed. New York: Rowman-Littlefield, 2001), 61-63, 126-146. It is not necessary here to discuss who constituted “the people” suffice to say that while understood to be everyone, it was, in reality only a percentage of white adult males.

<sup>43</sup> “Statement of the Berkshire County Representatives, Pittsfield MA,” November 1778 in Charles Hyneman and Donald Lutz, ed. *American Political Writings during the Founding Era, 1760-1805* 2 vols. (Indianapolis: Liberty Fund, 1983), 1: 455-479, quote on 456.

of that community.”<sup>44</sup> John Adams, in his letter to George Wythe that prefaced his “Thoughts on Government,” noted that “the foundation of every government is some principle or passion in the minds of people.”<sup>45</sup> Following the lead of Pittsfield, the New York mechanics, and Adams, an anonymously authored pamphlet, “The People the Best Governors,” focused his argument on how the people were the source of all government and authority no matter what the style of government adopted.<sup>46</sup>

Although popular sovereignty embodied a whole host of assumptions, two are of great importance to this chapter: the state constitutions and local instructions to elected leaders. The first state constitutions, written in the midst of Revolution, provide the clearest expressions of the idea popular sovereignty. An overwhelming majority of the states either had clauses that noted that all political power rested with the people or that the constitution was enacted from the will of the people, which was ironic since most states enacted their constitutions like normal legislation.<sup>47</sup> Thus, while some American

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<sup>44</sup> Quote from Morris, *Forging of the Union*, 117.

<sup>45</sup> John Adams, “Thoughts on Government” in Hyneman and Lutz, ed. *American Political Writings*, 401-410.

<sup>46</sup> Anonymous, “The People the Best Governors: Or a Plan of Government Founded on the Just Principles of Natural Freedom” (n.p., 1776).

<sup>47</sup> George St. Tucker summarized this idea in 1803 when he noted: “But the American Revolution has formed a new epoch in the history of civil institutions, by reducing to practice, what, before, had been supposed to exist only in the visionary speculations of theoretical writers . . . the world, for the first time since the annals of its inhabitants began, saw an original written compact formed by the free and deliberate voices of individuals disposed to united in the same social bonds; thus exhibiting a political phenomenon unknown to former ages. . . . This memorable precedent was soon followed by the far greater number of the states in the union, and led the way to that instrument, by which the union of the confederate states has since been completed, and in which . . . the sovereignty of the people, and the responsibility of their servants are principles fundamentally, a, unequivocally, established; in which the powers of the several branches of government are defined, and the excess of them, as well in the legislature, as in the other branches, finds limits, which cannot be transgress without offending against that greater power from whom all authority, among us, is derived; to wit, the people.” St. George Tucker, “On Sovereignty and Legislature” in Clyde N. Wilson, ed., *A View of the Constitution of the United States with Selected Writings* (Indianapolis: Liberty Fund, 1999), 19; Wood, *Creation of the American Republic*, 181-187, 244-283; Adams, *First State Constitutions*, 126-146; Donald Lutz, *Popular Consent, Popular Control: Whig Political Theory in the Early State Constitutions* (Baton Rouge: Louisiana State University Press, 1980),

Whigs considered written constitutions as fundamental and limiting on governmental power, they were ultimately superseded by a higher authority, the people who enacted them.<sup>48</sup>

The state constitutions, whether in reality or not, claimed to be the expression of the people's will, but the idea of popular sovereignty was put into actual practice when towns and villages from all across the states gave instructions to their elected representative, directing their delegate on how to vote on issues. These instructions varied somewhat in their presentation: some were nothing more than suggestions – expressions of the community's majority – while others were blatant commands demanding the representative vote the will of the community.<sup>49</sup> These instructions, no matter how they were couched, were always addressed at issues that affected their respected communities. Thus, they are wonderful gauges with which to judge what issues were of actual importance to Americans during the period. But more than their ability to note popular sentiment at the time, this authority, when coupled with the adherence to republican ideas, particularly virtue and elected representatives, served as the foundation for the Revolution and made the transition from imperial to republican government easier because, in theory at least, the new governments were created by “the people.”<sup>50</sup> It was this higher power of popular sovereignty that allowed for the enactment of anti-Loyalists legislation

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23-110; and Marc W. Kruman, *Between Authority and Liberty State Constitution Making in Revolutionary America* (Chapel Hill: University of North Carolina Press, 1997), 35-86.

<sup>48</sup> Horst Dipple, “The Changing Idea of Popular Sovereignty in Early America Constitutionalism: Breaking Away from European Patterns,” *Journal of the Early Republic* 16 (Spring, 1996): 21-45.

<sup>49</sup> Morgan, *Inventing the People*, 209-238.

<sup>50</sup> J.R. Pole, *The Gift of Government: Political Responsibility from the English Restoration to American Independence* (Athens: University of Georgia Press, 1983); R. R. Palmer, *The Age of the Democratic Revolution*.



### **The Anti-Loyalist Legislation**

The concept of the law in America and England in the decades before the Revolution and the development of popular sovereignty are necessary to understand in order to appreciate the change that occurred to the American concept during the war. Because of the Revolution, the American concept of the law began a fundamental shift away from the traditional understanding presented in the first section of this chapter. The American creation of republican legislatures based on popular sovereignty, entered the concept of the law into a period of flux – a tug of war, really – between the older concept of law being supreme and the newer, more modern idea of a sovereign entity commanding the law. Loyalists bore the brunt of this flux, and the anti-Loyalist legislation passed by the states during the Revolution represents the best example of this changing concept.

Interestingly enough, the first legal action against the Loyalists did not come from the colonies. Instead, it came in October 1774 from the first Continental Congress and the passage of the Association. While the Association was principally concerned with developing a boycott and non-importation of goods from England, one of its final clauses detailed the enforcement of the agreement. The Congress, via the Association, recommended the establishment local committees in every colony that were charged with observing “the conduct of all persons touching this Association.”<sup>51</sup> Should any person be caught violating the Association or upon the “satisfaction” of a majority of the committee that a violation had occurred, the perpetrator’s name would appear in the local newspaper. Not only that, but they would also be branded as a “fo[e] to the rights of

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<sup>51</sup> “The Association,” October 20, 1774, in Samuel Eliot Morison, ed., *Sources and Documents Illustrating the American Revolution and the Formation of the Federal Constitution, 1764-1788*, 2<sup>nd</sup> ed. (New York: Oxford University Press, 1972), 124.

British-Americans . . . universally contemned as the enem[y] of American liberty . . . [with] all dealings” broken off.<sup>52</sup>

Such a measure was unprecedented in American history and an important example of how the Revolutionary crisis brought about a change in American law. Aside from the fact that this Congress was the first truly inter-colonial gathering, what made the Association particularly interesting is how it established and required the enforcement of its own dictate. Although the punishment directed by the Association might not have been as harsh as those issued by the states against Loyalists just a year or two later. Nonetheless, and much like those laws, it represented a transition in the legal understanding of the period. The Association’s committees stated the facts of a case against a suspected violator, removing this power from any judicial authority, as was the norm, while establishing the guidelines for punishment, yet another typically judicial function.

The enforcement of the Association by committee was another unique development. By relying on local committees – many of whom were the local Sons of Liberty or Committees of Correspondence – to enforce its measures, the Continental Congress embraced several of the traditional legal arrangements of Anglo-American law.<sup>53</sup> First, by having provincial committees determine the guilt or innocence of a suspected violator (although the violation itself was determined already by the Association), the Congress followed the traditional precepts of local administration of

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<sup>52</sup> *Ibid.*

<sup>53</sup> Robert M. Calhoon, *Loyalists in Revolutionary America, 1760-1782* (New York: Harcourt, Brace, and Jovanovich, 1973), 302; David Ammerman, *In the Common Cause: American Response to the Coercive Acts of 1774* (New York: Norton, 1971), 103-124.

justice. Second, this local enforcement ensured that colonists would support or at least adhere to the Association. Yet, these were the only traditional elements of law found in the Association. The enforcement clause removed from local committees the facts of the case and the flexibility as to punishment, but by establishing a separate means of enforcement and coercion in the form of the committees, the Congress made itself, and not the law, the sovereign that needed to be obeyed. Moreover, it removed the common law traditions and customs in that no judge or jury was needed to find the innocence or guilt of an individual; instead, a majority of the committee members could make the decision. Finally, and perhaps most important, the Association wielded a coercive power against individuals previously unknown. Rarely, if ever, did the law – either civil or criminal – in eighteenth-century America force behavior. Instead, the law traditionally reacted to behavior.

The coerciveness of the Association can be noted in the numerous cases occurred where suspected Loyalists, or someone refusing to abide by the Association, was hauled before the local committee and forced to recant or acknowledge their sins against their fellow Americans. Janet Schaw, traveling in North Carolina in October 1775, left a remarkable account of how the local committee worked to “persuade” people to join the cause. She wrote

An officer or committeeman enters a plantation with his possee. The Alternative is proposed: Agree to join us, and your persons and properties are safe; you have a shilling sterling a day; your duty is no more than once a month appearing under Arms at Wilmingtontown, which will prove only a merry-making, where you will have as much grog as you can drink. But if you refuse, we are directly to cut up your corn, shoot your pigs, burn your houses, seize your Negroes and perhaps tar and feather yourself.<sup>54</sup>

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<sup>54</sup> Catherine S. Crary, ed., *The Price of Loyalty: Tory Writings from the Revolutionary Era* (New York: McGraw-Hill, 1973), 60-62, quote on 61.

Schaw's description appears to be accurate when compared to other examples from across the colonies. In Rochester, New Hampshire, for example, the local Association committee forced Nicholas Austin to confess that he had aided in the construction of barracks for the King's troops in Boston. In demonstration of their authority, the Rochester committee forced Austin to confess "on his knees, as nothing less would satisfy" the committee.<sup>55</sup> Jonathan Fowler and George Cornwell published apologies to the public for their initial apparent disapproval of the Association. Done in order to keep from being punished by the Westchester, New York committee, their recantations and assertions of loyalty to the American cause ensured that they would not meet a violent punishment by the committee.<sup>56</sup> In Virginia, John Prentiss begged the forgiveness of his countrymen for selling two barrels of tea, while various other planters and merchants in that colony were forced to agree to the Association.<sup>57</sup> The Baltimore County Committee in Maryland forced Reverend William Edmiston to explain remarks he made that supported the British Parliament. The Reverend quickly explained his remarks to the committee noting that he spoke in some haste and that mature reflection showed him the error of his ways.

The previous examples are illustrative of the type of authority these local committees wielded. Also, these examples are ones where the committee accepted the

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<sup>55</sup> "Concession of Nicholas Austin," in Peter Force, ed. *American Archives: Document Relating to the American Revolution*, Six Series (Washington D.C., Government Printing Office 1837-1853), Series 4, vol. 1, 974 [hereafter cited, Force, *American Archives*].

<sup>56</sup> Jonathan Fowler, Esq. and George Cornwell, Esq., "To the Public" April 29, 1775 in Force, *American Archives*, Series 4, 2: 653.

<sup>57</sup> "Concession of John Prentiss for Importing Tea" Williamsburg, VA., November 25, 1774 in Force, ed., *American Archives*; also see T. H. Breen, *Tobacco Culture: The Mentality of the Great Tidewater Planters on the Eve of the Revolution* (Princeton: Princeton University Press, 1985), 195-196, 201-203, for other examples of the Association in Virginia.

repentance. Committees throughout the colonies refused to accept the recantations of fellow subjects. With a great degree of arbitrariness, the accused violator's plea for forgiveness could be rejected for reasons that extended to only that the committee did not believe the sincerity of the plea. John Hopkins, a mariner from Savannah, Georgia, faced the wrath of a local lynch mob who gave the seamen the option of recanting his remarks against America or hang. Instead of hanging Hopkins from the liberty tree, the mob tarred, feathered and paraded the mariner around town. Only after begging "all America pardon" was Hopkins released.<sup>58</sup> What really mattered was not the oath or swearing of loyalty to the American cause as much as the whims of the committees, which was, in turn, the definition of arbitrariness Americans charged against Parliament.

The persecution and prosecution of suspected violators of the Association carries a large degree of irony. Although the Association contained traditional elements of the law, at the same times, it initiated a radically new aspect of legality that local enforcement committees brought to bear upon suspected violators. Commanding authority and demanding obedience, the local committees enforcing the Association acted in a fashion similar to what Americans accused of Parliament, namely acting with arbitrariness. For a revolution based on liberty and a distinct fear of centralized authority, the powers of the continental-wide Association were surprisingly accepted with little acrimony or suspicion. The fact that it was passed by a Continental Congress that had no true legal authority and that Americans could be hauled before its enforcement committees on mere suspicion and deprived the accused of traditional common law mechanism such as a jury not only represent the changing concept of the law but more

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<sup>58</sup> Crary, ed., *The Price of Loyalty*, 63.

important how that concept could be employed to great effect against those who did not support the American cause.

Just six months after the passage of the Association, open military conflict commenced with the battle of Concord. With the shift from constitutional arguments to rebellion, the former colonies responded to the new situation by enacting measures aimed at those who refused to embrace the Patriot cause. Each state, depending on how quickly Patriots seized control of the government, passed anti-Loyalist legislation.<sup>59</sup>

Generally, state legislatures passed six forms of legislation against Loyalists. Those acts included the “Test Acts;” acts limiting the political speech and action of particular individuals; acts disenfranchising Loyalists or removing them from any public office; acts quarantining, banishing, or otherwise expelling Tories from the state; acts making it a crime to adhere to Great Britain; and acts taxing, amercing, or confiscating Loyalists’ land. Some of these laws came at the behest and recommendation of the Second Continental Congress – such as the test acts and the confiscation of land – while the rest derived from the states themselves.<sup>60</sup> Examining some of these anti-Loyalist measures, both what they did and who enforced them, demonstrates that the concept of the law during the American Revolution was changing and was used against the Loyalists with great effect.

Each state passed a number of Test Acts during the Revolution.<sup>61</sup> With no exception, the male citizens of each state were the targets of the laws. They required that

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<sup>59</sup> Jackson Turner Main, *The Sovereign States, 1776-1783* (New York: Franklin Watts, 1973), 186-222.

<sup>60</sup> The Tory Act of January 2, 1776, and Tory Confiscation Act, November 1777, in Paul L. Ford, ed., *Journals of the Continental Congress, 1774-1789* (Washington D.C.: Government Printing Office, 1904-1908), 2: 45, 166.

<sup>61</sup> For brevity’s sake, the actual titles of the laws will be noted only in the notes. The text will examine only what the laws stated, the penalty, and who enforced them.

an oath of allegiance be uttered or signed by individuals. Where the states differed in this law was on the punishment and execution of the acts. In some states, the penalty was nothing more than the limiting or suspension of practicing the law or the ministry, or making them incapable of holding office.<sup>62</sup> Other states disenfranchised those refusing the oath and seized their weapons, while others still prohibited the dissenter to sue, collect debts, or buy land and sometimes required them to pay three times the amount of taxes, and, in great display of legislative authority, sit on juries.<sup>63</sup> Several states forced all of these punishments and added more. Pennsylvania, which passed some the harshest anti-loyalist laws, jailed, without any possibility of bail, anyone refusing to take their oath. They later extended this law to include members of the state and national legislature.<sup>64</sup> South Carolina, which followed the above pattern of the test laws, added an ultimate penalty to its Test Acts of 1778. Those refusing to agree to the oath had to sell or otherwise dispose of their property and then leave. If they returned or refused to depart, they faced execution.<sup>65</sup>

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<sup>62</sup> New Hampshire, Test Act of November 8, 1777 in *Session Laws*, (Exter, n.p., 1778), 87; Connecticut, "Oath of Fidelity" of October 10, 1776, in Connecticut, *Session Laws*, 1776 (New London: n.p., 1776), 432-433.

<sup>63</sup> Massachusetts, Test Acts of 1776 and January, April, and June 1778 in *Laws of Massachusetts, 1775-1780* (Boston: n.p., 1781), 31, 159, 161, 168, 185; New York, Test Acts of December 27, 1776, June 30, 1778, March 13, 1780, March 26, 1781, and April 11, 1782, in *Laws of the Legislature of State of New York in Force against Loyalists*, n.e. (London: H. Reynell, 1786), 252; New Jersey, Test Acts of September 19, 1776, June 5, 1777, October 6, 1777, October 1, 1778, in *Acts of the Council and General Assembly of the State of New Jersey* (Trenton: Isaac Collins, 1784): 1, 18, 27; Virginia, Test Acts of May 1777, May 1779, October 1780, May 1783, in William Hening, ed. *The Statutes at Large: Being a Collection of the Laws of Virginia from the First Session of the Legislature in the Year 1619*, 13 vols. (Richmond: J & G Cochran, 1821), 9: 281, 10: 22. North Carolina, Test Acts of November 22, 1776, and January 1777, in James Iredell, ed. *Laws of the State of North Carolina* (Edenton: Hodge and Wills, 1791), 281; Georgia, Test Act of August 20, 1781, in Robert and George Watkins, eds., *Digest of Laws of Georgia from Its First Establishment as a British Province to the Year 1798, Inclusive* (Philadelphia: R. Aitken, 1800), 237.

<sup>64</sup> Pennsylvania, Test Acts of June 13, 1777, and October 12, 1777, in James T. Mitchell and Henry Flanders, eds., *Statutes at Large of Pennsylvania: 1681-1809*, 18 vols. (n.p. WM Stanley Ray, 1896-1915), 9: 110-115 and 147-149.

<sup>65</sup> South Carolina, Test Acts of April 6, 1776, March 28, 1778, October 9 and 17, 1778, February 17, 1779, in Thomas Cooper, ed. *Statutes at Large of South Carolina*, vol. 4 (Columbia: A. S. Johnson, 1838), 338, 450, 468.

Enforcing these Test Acts were a myriad of officials. In some states, the enforcement of the acts was left to the Committees of Safety or Correspondence, or to the Justice of the Peace.<sup>66</sup> In other states, another officer, either civil or military, accompanied the Justice of the Peace.<sup>67</sup> In 1778, New York created a special commission whose sole purpose was to extract oaths from individuals. In 1781, they dissolved the commission, requiring that the presiding officer of elections obtain the oaths.<sup>68</sup> Other states relied on the citizens of the state to enforce the measure, but the majority of states required justices of their respective courts to oversee the execution of the acts.

As for the other types of anti-Loyalist legislation, they vary so greatly in detail as to bar the type of generalization required here. Some of these laws, especially in upper New England, had ominous titles, yet in actuality, were very mild having little, if any, serious ramifications as long as the loyalists behaved.<sup>69</sup> Others, however, were critical indeed, carrying with them serious and sometimes life threatening punishments. Aside from the Test Acts, the more common pieces of anti-loyalist legislation were those acts defining treason, providing for the expulsion of loyalists, and allowing the confiscation of loyalist property.

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<sup>66</sup> Those states were Massachusetts and Connecticut.

<sup>67</sup> Those states were Maryland and South Carolina.

<sup>68</sup> One year later, they changed the enforcement of the act to the justice of the peace. New York, Test Act of March 13, 1780, and March 26, 1781.

<sup>69</sup> See for example New Hampshire's January 17, 1777, "An Act for Preventing and Punishing such Offenses against the State as Do Not Amount to Treason or misprision of Treason" in *The Perpetual Laws of New Hampshire, From the General Court, July 1776 to Session in December 1788* (Portsmouth: John Melcher, 1789), 226-231; and Connecticut's 1775 "An Act for Restraining and Punishing Persons who are Inimical to the Liberties of this and the rest of the United Colonies," in *Public Records of Connecticut, from April 1836 to October 1776*, 15vols. (Hartford: Brown and Parson, 1850-1890), 15: 55-56.



If there was one type of anti-Loyalist legislation that conformed to traditional American understandings of the law, it was the treason laws. The next chapter will provide a greater explanation of the importance of treason laws to the reintegration of loyalists. But for this chapter it is critical to note that Bradley Chapin has asserted that most treason laws were not harshly enforced. He asserts that there appears to be a liberalization of the law from its English predecessors that more clearly defined treason, a liberalization that would eventually make its way into Article III of the federal constitution.<sup>70</sup> Chapin, however, fails to note one critical aspect of the treason laws employed during the Revolution. While cases of treason were heard before established courts and tribunals all across the country – again demonstrating the traditional elements of the law – these cases are significantly less than the number of people detained for treason. State legislatures passed numerous Bills of Attainder that accused and essentially convicted, without a trial or jury, a suspected Loyalist of treason.<sup>71</sup> While attainder legislation was not unprecedented in English history, it was uncommon in colonial history. In fact, most states expressly prohibited legislatures from passing attainder laws of any sort because, as the Delaware Declaration of Rights and Fundamental Rules noted, such laws were “oppressive and unjust.”<sup>72</sup> The States,

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<sup>70</sup> Bradley Chapin, “Colonial and Revolutionary Origins of the American Law of Treason” *William and Mary Quarterly* 17 (Jan. 1960): 3-21; English treason laws dated from the 1350 Statute of 25 Edward III, which declared treason as a “case where a man doth compass or imagine the death of our Lord the King” or visited violence upon the King and his relatives. Also included as treason was any “man levy war against our said Lord the King in his realm, or be adherent to the enemies of our Lord the King in the realm, giving to them aid and support in his realm or elsewhere; and thereof be attainted upon due proof of open deed by people of their condition.” Although this was the reigning statutory definition of Treason in England the prosecution of treason under this language was drastically expanded throughout the Tudor dynasty.

<sup>71</sup> These laws are listed in Appendix C of Van Tyne, *The Loyalists in the American Revolution*, 333-335, and aptly summed in Bradley Chapin, *The American Law of Treason: Revolutionary and National Origins* (Spokane: The University of Washington Press, 1963, 46-62.

<sup>72</sup> Delaware Declaration of Rights and Fundamental Rules,” June 11, 1776 in Phillip Kurland and Ralph Lerner, eds., *The Founder’s Constitution*, 5 vols. (Chicago: University of Chicago Press, 1987; reprint, Indianapolis: Liberty Fund, 2000), 3: 346.

however, showed little hesitation or unfamiliarity with attainder legislation as they passed numerous ones during the Revolution. Pennsylvania, for example, attained and sentenced to death 490 people for treason during the Revolution, and even kept a list of these traitors known as “The Black List.”<sup>73</sup> Because all of these attainders for treason deprived Loyalists of juries or trials, there are fewer examples of the arbitrary nature of the legislatures during the war than acts of attainder for treason. Other states followed suit, keeping in custody a great number of Loyalists throughout the period of the war. Therefore, while some treason cases may have followed procedures and conducted fair trials, these hearings are far from the norm, making treason laws just as much a part of the newer conceptual framework as the other anti-loyalists laws.

Often the penalty for committing the acts “lesser” than treason was banishment. Yet, states often bypassed this punishment and passed their own banishment laws aimed at removing Loyalists from certain parts of the states. A large number of Loyalists fled the continent during the Revolution but banishment laws only rarely required such drastic movement.<sup>74</sup> Instead, a great number of banishment laws (but not all) only forced Loyalists to move to designated areas in the state or in the immediately surrounding states. Frequently, however, loyalists fled the nation fearful of any further repercussions.

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<sup>73</sup> For the history of attainder legislation, see Leonard Levy, *The Origin of the Bill of Rights* (New Haven: Yale University Press, 2001). The next chapter will explore in greater detail the use of attainder legislation against Loyalists. “Pennsylvania Blacklist: A List of Those Tories Who Took Part with Great Britain in the Revolutionary War, and were Attained for High Treason” (Philadelphia: n.p., 1803). Most of those on the list were eventually pardoned. Those pardons can be found in vols 1-12 of *Records of Pennsylvania's Revolutionary Governments, 1775-1790*, (Pennsylvania Historical and Museum Commission. Division of Archives and Manuscripts); Henry J. Young, “The Treatment of Pennsylvania Loyalists,” (PhD Dissertation, The Johns Hopkins University, 1959).

<sup>74</sup> The number of loyalists who left the United States remains debatable with numbers as low as 25,000 and others as high as 80,000. See Van Tyne, *Loyalists in the American Revolution*, 243-267; Wallace Brown, *The King's Friends: The Composition and Motives of the American Loyalists Claimants* (Providence: Brown University Press, 1966), 2, and Gordon Wood, *Radicalism of the American Revolution* (New York: Vintage, 1991), 176.

Another more common kind of anti-loyalist legislation aimed to confiscate Loyalist property. In some cases, property seizure or confiscation was the punishment for certain crimes, such as treason or “lesser” treason. More often than not, however, incidents of confiscation occurred through specific attainder legislation. These acts regularly named particular “persons inimical to the Independence and liberties of the United States.”<sup>75</sup> Thus, confiscation of Loyalists’ land was not wholesale; rather, it was directed at selected individuals. Although other works have addressed whose property was confiscated and when, what is important to note here is that all states enacted numerous confiscation acts that not only directed whose land to take but how and when the property was to be sold.<sup>76</sup>

As with the Test Acts, the state legislatures empowered various bodies to enforce these and all other anti-loyalist legislation, especially the confiscation acts, which in some states were complicated.<sup>77</sup> The enforcement of the acts varied in degrees depending on how recent military combat was in a certain area.<sup>78</sup> What makes the legislation

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<sup>75</sup> Connecticut, “An Act for Confiscating the estates of Persons inimical to the Independence and Liberties of the United States,” in *Public Records of Connecticut*, 60.

<sup>76</sup> See especially Massachusetts, “Act for Confiscating the Estates of Certain Notorious Conspirators Against the Government” of April 30, 1779; New York, “Act for Forfeiture and Sales of the Estates of Persons who have adhered to the Enemies of this State,” October 22, 1779, and “Act for the Immediate Sale of Part of the Confiscated Estates” March 10, 1780; Virginia, “An Act to Secure the Movable Property of Those Who have Joined or hereafter May Join the Enemy,” May 1779. Bruce G. Merritt, “Loyalism and Social Conflict in Revolutionary Deerfield, Massachusetts,” *Journal of American History* 57 (Sept. 1970): 277-289, and Richard D. Brown, “The Confiscation and Disposition of Loyalists’ Estates in Suffolk Co. Massachusetts,” *William and Mary Quarterly* 21 (Oct. 1964): 534-550.

<sup>77</sup> Good examples of the complexity of the confiscation process are South Carolina, New Jersey, New York, Pennsylvania, and Massachusetts. There really is no published works that examine the “how” of confiscated property. See John Reilly Thomas, “The Confiscation and Sale of the Loyalists Estates and its Effects upon the Democratization of Landholding in New York State, 1776-1800” (PhD dissertation, Fordham University, 1974); Kathy Coker, “The Punishment of Revolutionary War Loyalists in South Carolina” (PhD dissertation, University of South Carolina, 1987); Peter Mitchell McQuiken, “Loyalists Property and the Revolution in Virginia” (PhD dissertation, University of Virginia, 1967); and Young, “The Treatment of Pennsylvania Loyalists.”

<sup>78</sup> Wallace Brown, *The Good Americans: The Loyalists in the American Revolution* (New York: Wallace Morrow and Co., 1969), 126-130.

exceptional, however, is, simply enough, its actual passage. All these measures, much like the Association of the First Continental Congress, were unprecedented. All of these acts, moreover, represent an arbitrariness that was lacking in the practice of Anglo-American law. Never before had a colonial (now state) legislature used the law with the degree of coerciveness represented in these anti-Tory laws. Exerting and wielding command, the legislatures declared themselves the masters of the law and not its servant. By depriving specific members of their state of specific customary rights and privileges, the legislature, and not established customs and traditions, delineated the line between liberty and arbitrary.

The rule of law as it had previously been understood was undergoing change, as this legislation clearly demonstrates. But this metamorphosis was not absolute. There remained, however unique, traditional elements of the law within this anti-loyalist legislation. The most conventional aspect of the law was the enforcement mechanisms. A great number of the laws relied on the court system to ensure the enforcement of the measures. If the courts were unavailable, the legislatures relied upon local committees to see that acts enforced. This reliance on local committees was, in and of itself, highly unique and often resulted in a harshness that may not have been intended by the legislatures. Yet, the enforcement-via-committee was an attempt to ensure the measure's legitimacy – perhaps not as with traditional concepts of the law – but at least in the minds of the legislatures and a portion of their citizens.<sup>79</sup> Therefore, the blending of older concepts of the law with the newer ideas of legislative authority found in the anti-loyalist

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<sup>79</sup> See Calhoun, *Loyalists in Revolutionary America*, 301-307; Harold H. Hyman, *To Try Men's Souls: Loyalty Tests in American History* (Berkeley: University of California Press, 1960), 61-117.

legislation represents the changing perception and fluidity of the law during the Revolution.

The degree to which these laws punished Loyalists to some degree during the Revolution is remarkable. Evidence proves that Loyalists from all social-strata were targets of the States' legislation. Not only were they arrested for treason but their property was confiscated, and although the exact number of Loyalists who had land confiscation is not known, it could easily be in the thousands.<sup>80</sup> At the same time, Patriots forced many Loyalists to leave their area (although a number also left before any forcible action could be taken). Finally, ten of the thirteen states executed suspected and convicted Loyalists.<sup>81</sup>

The enactment and enforcement of anti-Loyalist laws challenge several important assumptions historians have made about Revolutionary America. First, these measures question the degree to which Americans had accepted the idea of a written constitution as the fundamental and inviolable. The idea of a written constitution was among the most important developments and consequences of the Revolution and each state worked and struggled to write and adopt theirs.<sup>82</sup> The degree to which the State Legislatures flagrantly violated their constitutions and bills of rights with the passage of anti-Tory laws should caution against assumptions that Revolutionary Americans had fully

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<sup>80</sup> The best source on whose lands were confiscated is the London Audit Office's collection in Merritt, "Loyalism and Social Conflict in Deerfield"; Brown, "The Confiscation and Disposition of Loyalists' Estates in Suffolk Co. Massachusetts," 534-550; Thomas, "The Confiscation and Sale of the Loyalists Estates in New York State"; Coker, "The Punishment of Revolutionary War Loyalists in South Carolina"; and McQuiken, "Loyalists Property and the Revolution in Virginia."

<sup>81</sup> Cary, *The Price of Loyalty*, 223-231, particularly 224 n1. In his *Notes on Virginia*, Thomas Jefferson noted that Virginia demonstrate great restraint by not executing a single Tory. Either forgetting or through bad information, Jefferson was incorrect on the figure. By 1783, when Jefferson published his only work, Virginia had executed 3 Loyalists. Jefferson, *Notes on Virginia*, 189-190.

<sup>82</sup> Wood, *Creation of the American Republic*, 259-343; Willi Paul Adams, *The First American Constitutions*, *passim*; Marc W. Kruman, *Between Authority and Liberty*, 35-61.

comprehended and embraced the idea of fundamental, written constitutions. Although it is fair to say that Americans viewed Loyalists as being “beyond the pale” of constitutional protections,<sup>83</sup> it is more appropriate to suggest, instead, that during the embryonic years of nationhood, the constitutional makeup of the states resembled a legislative supremacy more akin to what Parliament had attempted to wield over the colonies than one of limited, restrained government via written constitutions. It must be noted that during the Revolution, Patriots probably never fully comprehended the length to which this supremacy – at least to the degree that it resembled Parliaments – stretched, especially since so many of the laws aimed at Loyalists kept traditional elements of jurisprudence. Nevertheless, the power of legislatures expanded in unprecedented degrees, as the anti-loyalists laws show.

This notion of legislative supremacy leads to the second suggestion offered by anti-Loyalist laws. It is entirely possible that the Founders believed that moments of great crisis – such as the Revolution – allowed for the enactment of punitive laws against internal enemies, people who otherwise shared the same rights. Again, this idea is just conjecture but a strong sense exists that this could be the case and could help explain not just the anti-loyalists laws but also the Alien and Sedition Acts of 1798, and the action of President Thomas Jefferson during the embargo crisis of 1807-1809.<sup>84</sup> The potential to punish internal enemies in times of crisis appears even more plausible when combined

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<sup>83</sup> Edward S. Corwin, “The Progress of Constitutional Theory between the Declaration of Independence and the Meeting of the Philadelphia Convention,” *The American Historical Review* 30 (April 1925): 511-536, quote on 518.

<sup>84</sup> On the Alien and Sedition Acts, the standard work remains James Morton Smith, *Freedoms Fetter: The Alien and Sedition Laws and American Civil Liberties* (Ithaca: Cornell University Press, 1956), and, for Jefferson’s actions during his Presidency, see Leonard Levy, *Jefferson and Civil Liberties: The Dark Side* (Cambridge: Harvard University Press, 1963).

with the ideological attacks Patriots made against Loyalists during Revolution, as well as the ideological struggle that dominated the First Party System.

Examining these laws and their break with a century and a half of colonial law, raises the question of how these acts were passed in the first place. In other words, what force or factors allowed this change in the law to occur? It is a legitimate question, given the sharp divergence of these laws, but because historians often overlook legal developments, it is also a question historians have failed to ask. What led to the enactment of these anti-Loyalists laws was the development of idea of popular sovereignty. Because republican ideology taught that these laws were the will of people, and since Americans during the Revolution believed that all authority was derived from the people, the idea of legislative authority via popular sovereignty helps explain why these laws enacted in the first place. The enactment of anti-Loyalists measures, with their clear violation of constitutional limitations and their resemblance to parliamentary supremacy, posed a challenge to how historians have viewed the American development of a popular sovereignty. As Willi Paul Adams has noted in the standard work on the state constitution-making during the Revolution, “the ‘people’ in America did not become a collective tyrant because this new sovereign accepted a basic limitation of its powers in the form of bills of rights.”<sup>85</sup> Adams is right, of course, the American people did not devolve into despotism, but he nonetheless accepts that Americans had wholly embraced the inviolable nature of constitutions. He fails to notice, however, that popular sovereignty was a much more volatile concept during the Revolution.<sup>86</sup> The arbitrariness

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<sup>85</sup> Adams, *The First American Constitutions*, 142.

<sup>86</sup> Although this is my own conclusion, it is shared by Morgan, *Inventing the People*, 254-257. There is a difference, however, in the volatility. Whereas I see this volatility arising from the unprecedented coerciveness of the anti-Loyalists laws, Morgan views it as stemming from a similarity between lower and

of these anti-Tory laws was overlooked by most Americans during the war because Americans considered the acts based on the will of the people. Therefore, instead of bills of rights and constitutions fettering popular sovereignty, what popular sovereignty based upon republican principles allowed for was the instilling of unprecedented authority to the legislatures.<sup>87</sup> This, in turn, allowed for the enactment of measures based upon the will and authority of the legislatures and not on ideas and concepts buried in the mists of time and designed to limit authority.

To republican idealists, legislative enactments constituted expressions of the will of the people. As an editorial in the *Boston Independent Chronicle* stated in 1786, “the people resign their own authority to their representatives – the acts of these deputies are in effect the acts of the people.”<sup>88</sup> As a result of this new republican concept of the sovereignty of the people, legislative measures were fast becoming the command of the sovereign. Nowhere was this idea of the law being the command of the sovereign stated better than in the same editorial of the *Independent Chronicle*. After asserting the idea that the acts of the legislatures were in essence the acts of the people, the editorial continued by stating that should an improper law be passed, a new legislature would repeal the act “but while it is a law, *it is the act and will of the sovereign power and ought to be obeyed.*”<sup>89</sup> What the editorial claimed was that the law as determined by the legislature was now the command of the sovereign – no matter how wrong or improper. It is hard to imagine a colonial newspaper editorial written as late as the 1760s making

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upper houses of the legislature. While there was some discontent among some leading Revolutionaries over how responsive the upper chamber was popular passions, it seems to lack the volatility of popular sovereignty that the anti-loyalists laws demonstrate.

<sup>87</sup> Wood, *Creation of the American Republic*, 373.

<sup>88</sup> *Boston Independent Chronicle*, August 31, 1786.

<sup>89</sup> *Ibid.* Emphasis added.



such an assertion! It would be difficult indeed to find such an idea because it took the American Revolution to effect such a truly radical change.<sup>90</sup> The older concept of the law as a guarantor and protector of rights was beginning to crumble under the impressive weight of this newer, republican concept. Therefore, because of this concept of the sovereignty of the people, legislatures enacted the coercive anti-loyalist measures during the Revolution.

Popular sovereignty played the same detrimental role in the reintegration of the Loyalists as it did during the war. Across the confederation, great opposition existed to allowing Loyalists to return and against repealing any anti-Loyalist law. State legislatures enacted measures against Loyalists even after the Treaty prohibited such actions.<sup>91</sup> Massachusetts, New York, Georgia, and South Carolina, just to cite a few examples, passed new measures against Loyalists. Most of these measures either defined or redefined treason or citizenship, or continued or restarted confiscation or amercement acts.<sup>92</sup> Virginian Governor Benjamin Harrison issued a proclamation calling for those Loyalists who had returned without legal authorization to depart from the state until

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<sup>90</sup> Wood, *Creation of the American Republic*, *passim*; *Radicalism of the American Revolution*, *passim*; Bailyn, *Ideological Origins of the American Revolution* (Cambridge: Harvard University Press, 1967), 198-229.

<sup>91</sup> In New York, those acts were the Trespass and a second Confiscatory Act (the first was passed in 1778), and, in South Carolina, it was the Confiscation and Amercement Acts. These will be discussed further in chapter 6.

<sup>92</sup> Massachusetts, "Act for Asserting the Right of this Free and Sovereign Commonwealth, to Expel such Aliens as may be Dangerous" in "A Collection of the Acts or Laws Passed in the State of Massachusetts Bay, Relative to the American Loyalists and Their Property" (London: John Stockdale, 1785), 26-30; New York, "An Act to Preserve the Freedom and Independence of this State, and for other Purposes therein mentioned" May 12, 1784, in *New York Laws Against Loyalists*, 110; Georgia, "An Act for the Confiscating of the Estates of Certain Persons" January 11, 1782, "An Act for Inflicting Penalties on, and Confiscating the Estates of Such Persons as are Declared Guilty of Treason," May 4, 1782, in *Digest of the Laws of Georgia*; South Carolina, "Act for Disposing of Certain Estates and Banishing Certain Persons Therein Mentioned," "An Act for Amercing Certain Persons Therein Mentioned," in *Statutes At Large of South Carolina*, 4:516-523.

legally allowed to re-enter to the state.<sup>93</sup> These legislatures and governors were not acting in a vacuum; they were following what appeared to be the sentiments of their constituents because after the war town committees from all across the country formed, often for the sole purpose of opposing the return of Loyalists.<sup>94</sup> With little exception, the committees passed resolutions instructing their delegate not to repeal the anti-Tory laws, or in some cases to pass laws that would clearly prohibit their return.<sup>95</sup> A good number of these committees argued that such laws were perfectly just and necessary. In part, they believed in the laws because of their ideological opposition to Loyalists, but they also supported the laws because they were enacted through the power of the people.<sup>96</sup>

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<sup>93</sup> Benjamin Harrison, "A Proclamation," July 2, 1783, in *The Virginia Gazette*.

<sup>94</sup> Roberta Tansman, "The Treaty and the Tories: The Ideological Reaction to the Return of the Loyalists, 1783-1787" (PhD dissertation, Cornell University, 1974): 71-89.

<sup>95</sup> "A Meeting of the Most Respectable Inhabitants of Baltimore-Town," June 23, 1783, in *The Pennsylvania Packet*, June 26, 1783.

<sup>96</sup> One of the best sources for the nation-wide opposition to returning Loyalists is the *Pennsylvania Packet*. See "Decius," in *The Pennsylvania Packet*, April 10, 1783; "Resolves [group unknown]," "A Meeting of the Inhabitants of the Town of Stanford," in *The Pennsylvania Packet*, April 29, 1783; "Instructions of the Town of Roxbury," "Instructions of the Town of Malden, to Their Representative," in *The Pennsylvania Packet*, June 10, 1783; "To the Chairman of the Committee of Correspondence, at Boston" in the *Pennsylvania Packet*, May 20, 1783; "An Old Whig" in *Pennsylvania Packet*, May 24, 1783; "A Meeting of the Officers of the Militia of the City and Liberties of Philadelphia," May 29, 1783, in *The Pennsylvania Packet*, May 31, 1783; *The Pennsylvania Packet*, June 3, 1783; "Extract of a letter from a Gentleman in Worcester, NY" and "A Packet from New York," *The Pennsylvania Packet*, June 5, 1783; "Proceedings of the Freeman of the City and Liberties of Philadelphia," "A Respectable Meeting of the Freemen of the County of Burke," "A Circular Letter from the Freeman of the County of Burke," "A Petition the Inhabitant of Richmond [Virginia]," *The Pennsylvania Packet*, June 17, 1783; "A Meeting of the Freeholders and Other Inhabitants of the Town of Worchester," "Extract of a Letter from Charleston, South Carolina dated June 2, 1783" in *The Pennsylvania Packet*, June 19, 1783; "A Meeting of the Principal Inhabitants of Mohawk District, in Tryon County, Albany, New York," "A Meeting of the Most Respectable Inhabitants of Baltimore-Town" June 23, 1783, "Resolved of the Delaware Regiment of Militia in Kent County," June 5, 1783, "A Meeting of the Officers and Other Respectable Inhabitants of the Fifth Battlion District," in *The Pennsylvania Packet*, June 26, 1783; "A Meeting of the Freeholders and other Inhabitants of the Town of Lexington, Legally Assembled, May 22, 1783," in *The Pennsylvania Packet*, June 28, 1783; "From Philadelphia, July 3," "Extract of a Letter from Charleston, South Carolina, dated June 7, 1783," in *The Pennsylvania Packet* July 3, 1783; "To John Thorton and John Heath," Richmond, Virginia June 23, 1783, "Resolves of the Respectable Inhabitants of Elk-Ridge," July 4, 1783, "A Meeting of the Committee for the City and Liberties of Philadelphia," June 30, 1783, in *The Pennsylvania Packet*, July 8, 1783; "A Meeting of the Inhabitants of the District of Cambridge, in the County of Albany," June 30, 1783, in *The Pennsylvania Packet*, July 15, 1783; "A Meeting of a Number of the Freeholders and Inhabitants of the manor of Scarsdale, in the County of Westchester, July 3, 1783,"

That the great number of committees and delegates passed resolutions and instructions demonstrate the importance Loyalist reintegration was to the post-war nation. More important, however, these committees were, in essence, flexing the notion of popular sovereignty by taking it upon themselves to enforce anti-loyalists laws or, when those laws were being repealed, to enforce their own idea of who should be a citizen. As the “Freeman of Philadelphia” stated in their proceedings, it was their “duty as citizens and individuals to prevent” Loyalists from returning and becoming citizens themselves. Demonstrating the belief in the will of people should be obeyed the same Philadelphia Freeman asserted that it was “an unquestionable right . . . to instruct their representatives on subjects of political importance.” This sentiment was echoed by a “Delaware Regiment of Militia” when it noted that its meeting and instruction of their representative was “an unalienable right” of the people.<sup>97</sup> Further demonstrating that many Americans believed their will should be followed, most, if not all, of these committees were self-created. Local citizens formed them to insure that their will would be followed and Loyalists would not re-admitted.

### **Loyalists and Patriot Opposition to the Anti-Loyalist Legislation**

Although the anti-loyalists laws led to a conceptual fluidity in the law, not everyone accepted the measures. Some of the opposition even recognized the radically new conceptual shift that these laws represented. This opposition started with the Association itself. Not surprisingly, the harshest criticism came from those who

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“Extract from the Proceedings of the Freeholders and Inhabitants of Amenia,” in *The Pennsylvania Packet*, July 1783.

<sup>97</sup> “Proceedings of the Freeman of the City of Philadelphia,” June 17, 1783, in *The Pennsylvania Packet*, June 17, 1783; “Delaware Militia Group,” June 5, 1783; Also see “A Meeting of the Officers of the Militia of the City and Liberties of Philadelphia,” May 29, 1783, in *The Pennsylvania Packet*, May 31, 1783.

supported Parliament's case against the colonists. Historians view the Loyalist critique of the first Continental Congress and the Association as part of either their ideology or propaganda.<sup>98</sup> While these two aspects of the critique are correct, what is overlooked, and what makes the appeals of these loyalists interesting, was that many of them recognized the shift in authority of the law that the Association wrought. Daniel Leonard of Massachusetts noted that the Association and its committees "frequently erect themselves into a tribunal, where the same personnel are at once legislators, accusers, witnesses, judges and jurors, and the mob the executioners."<sup>99</sup> In other words, these actions were not lawful and did not assure the protection of the law. Other Loyalists noted that the Association violated the normal, traditional aspects of the law. No jury or other judicial function, no probable cause to search a home or other property existed. Instead, the authority rested solely with the entity itself, the Association. What is more, it wielded a coercive authority that rendered absurd the colonists' grievance that Parliament wielded unconstitutional power. As Samuel Seabury, one of the Loyalists most critical towards the anti-Tory laws, noted

Do as you please: If you like it better, choose your Committee, or suffer it to be chosen by half a dozen Fools in your neighborhood – open your doors to them, – let them examine your tea-cannisters, and molasses-jugs, and your wives and daughters petticoats – bow, and cringe, and tremble, and quake, – fall down and worship our sovereign Lord the Mob. – But I repeat it, by H...n, I will not. – No, my house is my castle: as such I will consider it, as such I will defend it, while I have breath. No *King's* officer shall enter it without my permission, unless supported by a warrant from a magistrate. – And shall my house be entered and my mode of living

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<sup>98</sup> For the Loyalist's view of the laws, see Brown, *The Good Americans*, 131-139; Potter, *The Liberty We Seek*, 29, 59; Robert Calhoun, "The Loyalist Perception," in Calhoun, ed. *The Loyalist Perception and Other Essays* (Charleston: University of South Carolina Press, 1987), 1-14.

<sup>99</sup> Quote taken from Potter, *The Liberty We Seek*, 29.

enquired into, by a domineering Committee-man? Before I submit I will die: live *you* and be slaves.<sup>100</sup>

Despite his flair for the dramatic, Seabury noted the difference between traditional Anglo-American law and the new authority exercised by the Continental Congress and the Association.

Loyalists opposed more than just the Association. During the War, they repeatedly criticized the states' measures aimed against them.<sup>101</sup> Joseph Galloway, writing in London while exiled, summarized the Loyalist critique of the legislation when he wrote in 1786 that the Patriots "assumed the rights of independent legislation, of judicial enquiry, sentence, and execution. The prevalence of the power and violence" of the Patriots was so intense that those who chose to side with England and or simply refusing to ally themselves with the American cause "were disarmed, tarred, feathered, and inhumanly treated."<sup>102</sup> Even after facing the wrath of the Americans, Loyalists "were [then] reduced to the alternative of escaping from the tyranny, or of being imprisoned" by state legislatures.<sup>103</sup> Despite the obvious bias, a great deal of truth to Galloway's remarks exists. As already noted, the laws targeting Tories were harsh in some cases. What makes these critiques even more interesting and ironic is that they came from former Americans who Patriots accused of embracing the very notion of the law that caused the Revolution in the first place.

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<sup>100</sup> Samuel Seabury, "Free Thoughts on the Proceedings of the Continental Congress (New York: n.p. 1774), 60.

<sup>101</sup> Van Tyne, *Loyalists in the Revolution*, 190-212; Calhoun, *Loyalists in the American Revolution*, *passim*; Brown, *Good Americans*, 126-130.

<sup>102</sup> Joseph Galloway, "The Claim of the American Loyalists Reviewed and Maintained upon Incontrovertible Principles of Law and Justice" (London: G and T Wilke, 1786), 4-5.

<sup>103</sup> *Ibid.*, 5.

Loyalists were not the only ones condemning the measures intended to harm them, but they were among the only ones seriously critical of the legislation during the war. After the conclusion of the war, however, and with Article Four of the Treaty of Paris calling for the repeal of some anti-Loyalist legislation, the measures faced increasing opposition from Patriot opponents.<sup>104</sup> Historians have generally viewed these calls as nothing more than conservative patriots trying to assist conservative loyalists, because of personal friendships and ideologies, or intrastate political machinations in which one party would oppose anti-loyalist laws and the other support them.<sup>105</sup> What has gone unnoticed is that many of the writings advocating the repealing of the laws recognized the coerciveness and uniqueness of the measures. The evidence does not support the argument that the drives behind these calls for repeal were from a shared conservatism or friendship; instead, they stemmed from the argument that these laws were antithetical to liberty. They were, in other words, not restraints upon authority or in defense of liberty but rather coercive and arbitrary.

Many of the calls for repeal of the anti-Loyalists laws came from the works of the same people who initiated the ideological shift from republicanism to liberalism. Benjamin Rush, for example, in the same work in which he called for a charitable reintegration of the Loyalists noted that Pennsylvania's Test Act was a clear violation of that state's constitution. In South Carolina, Aedanus Burke while attacking the confiscation measure of his home state in his pamphlet noted the arbitrary nature of much

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<sup>104</sup> Article IV of the Treaty of Paris, 1783.

<sup>105</sup> Merrill Jensen, *The New Nation: A History of the United States during the Confederation, 1781-1789* (New York: Vintage, 1950), 265-281; Jackson Turner Main, *Political Parties before the Constitution* (New York: Norton, 1973), *passim*; Van Beck Hall, *Politics without Parties: Massachusetts, 1780-1781* (Pittsburgh: University of Pittsburgh Press, 1972), 131-167.

of anti-Loyalist measures. Burke noted that South Carolina's measures against the Loyalists were not just cruel but were unjust and clear violations of the state Constitution and laws. The fact that South Carolina's laws also deprived Loyalists of any judicial hearing or jury removed "the first and most sacred rule of justice." The Bills of Attainder used to condemn the suspected Tories without trials went beyond the coerciveness of Parliament when the latter employed them during the Civil Wars. The arbitrariness of the South Carolina legislature led Burke to damn it as being a tyrant worthy of the English Parliament.<sup>106</sup> Alexander Hamilton, in his Phocion essays, struck at the heart of the problem noting that the measures pretended

to appeal to the spirit of Whiggism, while they endeavour to put in motion all the furious and dark passions of the human mind. The spirit of Whiggism, is generous, humane, beneficent and just. These men inculcate revenge, cruelty, persecution, and perfidy. The spirit of Whiggism cherishes *legal liberty, holds the rights of every individual sacred, condemns or punishes no man without regular trial and conviction of some crime declared by antecedent laws, reprobates equally the punishment of the citizens by arbitrary acts of legislature.*<sup>107</sup>

These three authors were not the only commentators on the problems with the anti-Loyalist laws. Writing a year after Burke's condemnation of the South Carolina Thomas Tudor Tucker, under the pseudonym of "Philodemus," also pointed to the coerciveness of the anti-Loyalist measures. Claiming that the state legislature was accused of "stretch[ing] their authority too far" Tucker noted that when there was a question of whether laws should be merciful or punitive, it was "a rule of justice" to err on the side of mercy. Mercy was not, however, the selection of the South Carolina

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<sup>106</sup> Aedanus Burke, "An Address to the Freeman of the State of South Carolina," (Philadelphia: Robert Bell, 1783), 16. Also see Arthur Middleton to Aedanus Burke, June 10(?), 1782 in Paul H. Smith, ed., *Letters of Delegates to Congress*, 25 vols. (Washington, D.C.: Library of Congress, 1976-2000), 18: 569.

<sup>107</sup> Alexander Hamilton, "A Letter from Phocion to the Considerate Citizens of New-York on the Politics of the Day," in Joanne Freeman, ed., *Alexander Hamilton: Writings* (New York: Library of America, 2001), 127. Emphasis added.

legislature. It chose, instead, the “unequal distribution of justice, or rather unjust distribution of punishments.”<sup>108</sup> In other words, the legislature was acting arbitrarily. In North Carolina in 1779, James Iredell, a future Justice of the United States Supreme Court, noted that moderation was lacking in his home state. Seven years later, Iredell made his feelings even clearer on his state’s confiscation law claiming that he would never “support, countenance, or have act or part, in carrying so infamous law into execution.” The North Carolina Judge worried further noting that while supporting republican government “every principle of decency and justice should be so wantonly sacrificed” by the Confiscation Act.<sup>109</sup>

What Tucker, Iredell, and the other opponents of the laws observed, however, was that while the Legislature was acting with arbitrariness it was doing so with the blessing of the people, or so it seemed. Tucker questioned the degree to which the citizens of his home state really wanted the extreme punishment dealt to Loyalists. He suspected that the legislature acted on its own accord. Yet, Tucker’s suspicion of the Legislature’s actions directed after the conclusion of the war. He appears to have had no problem with the law or its enforcement during the conflict. He even acknowledged that these laws were enacted with the blessing of the people.<sup>110</sup>

The recognition that too much popular power allowed for the enactment of the anti-Loyalist measures was a significant development. Those calling for the repeal of the measures not only had to demonstrate why individual rights were just as important as the

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<sup>108</sup> Thomas Tudor Tucker, “Conciliatory Hints, Attempting, by a Fair State of the Matters, to Remove Party Prejudice,” in Hyneman and Lutz, eds., *American Political Writings*, 1: 609-610.

<sup>109</sup> James Iredell to Hannah Iredell, February 8, 1779, in Griffith J. McRee, ed., *Life and Correspondence of James Iredell*, 2 vols. (New York: D. Appleton, 1847; reprint: New York: Peter Smith, 1947), 1: 419; Iredell to William Hooper, January 29, 1786, in McRee, ed., *Life of James Iredell*, 2: 133-134.

<sup>110</sup> *Ibid.*, 609.



rights of the community, but for Loyalists to be reintegrated as full citizens, the laws against them had to be repealed. Repealing these laws meant, however, that popular sovereignty had to be reined in and confined. Pro-reintegration advocates, in some cases, were explicit in their calls for containing and limiting popular sovereignty and the potential and actual arbitrariness of legislatures. Joining Tucker and Burke's essays in South Carolina, were "A Patriot" and "A Planter" who both condemned the crowd actions against Loyalists in South Carolina. These two essayists noted that the crowds influence upon the legislature and that body's actions were "full of windy doctrines and stormy passions" that perverted the "professed principles on which this Revolution was undertaken and prosecuted, the liberties of Mankind."<sup>111</sup>

In Massachusetts, Samuel Adams, that great organizer of local committees, condemned the creation of local groups designed to keep out Tories. Fearing that these groups would bring "contempt and dissolution" to the government by their continual attempts at influence, Adams also believed that these groups lacked any respect for "our happy revolution and that common liberty" of all Americans.<sup>112</sup> In New York, soon after the publication of Hamilton's "Phocion" essays, another editorial appeared condemning the group actions against Loyalists. Focused more on the sanctity of the Treaty, the essay nonetheless criticized the committees and groups that called for further Loyalists calling them "fools" and "knaves" and men who "pretend to be honest" patriots while threatening the foundation of the state by not allowing it administer justice.<sup>113</sup>

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<sup>111</sup> "A Patriot," in *South Carolina Gazette and General Advertiser* July 15, 1783, and "A Planter" in *South Carolina Gazette and General Advertiser* August 9, 1783.

<sup>112</sup> Samuel Adams to Noah Webster, April 30. 1784, in Harry A. Cushing, ed., *The Writings of Samuel Adams* 4 vols. (New York: G. P. Putnam's Sons, 1904-1908), 4: 304-307.

<sup>113</sup> Anonymous, *New York Packet*, May 10 1784. Other examples can be found in Tansman, "The Return of the Tories:" 116-139. Wood, *Creation of the American Republic*, 393-429, has the standard discussion on American's growing disillusionment with popular government.

By reorienting legislatures and fellow citizens to the importance of the constitutions and the problems of popular sovereignty, those Americans calling for a repeal of anti-Loyalist laws demonstrated both the arbitrariness of these laws and if returning Loyalists (and Americans in general) were to live in peace, legislatures would have to repeal those laws. To be sure, Americans still moved from the pre-Revolutionary notion of the law as custom – the Revolution and development of written constitutions ensured that – but, at the same time, they began to curb of the power of popular sovereignty. If it was the constitution that should be “the palladium of liberty,” the natural correlation was that the popular sovereignty had to be limited; otherwise, arbitrary government could develop.<sup>114</sup> Not by coincidence, this fettering of popular sovereignty in order to allow a reintegration of the Loyalists corresponds, interestingly enough, with the diminution of the idea of a “return to first principles,” namely that the people could alter or abolish their governments.<sup>115</sup>

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<sup>114</sup> Rush, “Considerations on the Test Act,” 4. Also see Anonymous, “Rudiments of Law and Government Deduced from the Law of Nature,” in Hyneman and Lutz, eds., *American Political Writing*, 565-605. While this essay does not discuss Loyalists, it does hit upon several of the issues discussed in this chapter. The unknown author’s intention is to demonstrate the importance of written constitution to the preservation of natural rights. The work is also a great example of how the understanding of the law during this period was in flux. The essayist argues in one section of the work that “Law from precedent should be altogether exploded. Either there is not exercise of justice in the case, or the law is deficient. And it is not a single evil that results fostering law courts to become legislative. What people in their senses would make the judges, who are fallible men, depositaries of the law; when the easy, reasonable method of printing, at once secures its perpetuity, and divulges it to those who ought in justice to be made acquainted with it.” In other words, the customary nature of the law – the concept of the law that was prevalent before the Revolution – did not lend itself to the justness of the people. Not only this but to have judicial bodies discover the law, a trademark of Common Law, was considered by the author to be contrary to liberty. Within a span of seven years, the concept of the was fundamentally altered as this pamphlet demonstrates. Quote from page 509.

<sup>115</sup> To be sure, the idea that the people can change their government remains an aspect of American political thought. There is a difference, however, between a return to first principles and altering government. This difference lies in the notion of a written constitution. Since written constitutions denote the form of the government, they can be amended or re-written. A return to first principles, however, is revolutionary in nature and can lead to violate upheavals. See Gerald Stourzh, *Alexander Hamilton and the Idea of Republican Government* (Stanford: Stanford University Press, 1970), 1-65.

The repeal of anti-Loyalist legislation by the states did not occur overnight. While North Carolina passed an “Act of Pardon and Oblivion” and Connecticut enacted a similar measure, both in early 1783, that erased all legal prohibitions against Loyalists, most states did not abolish most of their anti-loyalists laws until the late 1780s. In some cases, some anti-Loyalists laws were on the books until well into the nineteenth century.<sup>116</sup> Despite taking several years, repeal of most of the anti-Loyalist laws did occur. Repeal, however, was not guaranteed because the American Revolution created a fluctuation in the concept of law that allowed for the enactment of the measures, the persecution of Tories, and served as a strong barrier to Loyalist reintegration. Before the Revolution, Americans adhered to an older understanding of the law: one that limited governmental authority and relied on local juries for both enforcement and consent. In clinging to this older view of law, Americans rejected the idea of Parliamentary supremacy and law being the command of the sovereign that had developed in England after the 1688 Glorious Revolution. Once the smoke of Lexington and Concord had cleared, the American conception of the law began to change, demonstrating an unprecedented coerciveness that resembled the command of the sovereign rather than a limitation on power. What allowed for this beginning shift was the development and implementation of the idea of popular sovereignty. While a driving force behind the notion of written constitutions that were intended to limited government, popular sovereignty also had a darker, more volatile side. With government being based on

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<sup>116</sup> North Carolina, “An Act of Pardon and Oblivion,” April 18, 1783, in William Clark, ed., *State Records of North Carolina* 26 vols. (Raleigh, P.M. Hale, 1886-1907), 24: 489-490. It is critical to note that the Act of Oblivion severely limited the beneficiaries of this law. Those who had aided England in any fashion were attained in confiscation acts. Pardoned Loyalists were still forbidden to vote or be elected to any office in the State. Nor did the act allow for an easy recovery of debts.; David E. Maas, “The Return of Massachusetts Loyalists,” (Ph.D. dissertation, University of Wisconsin, 1972), 467-520; Morris, *Forging of the Union*, 200.

consent of the people, legislatures were imbued with great authority and could enact measures that could violate even the new constitutions. Nowhere was this development more evident than in the legislation passed against the Loyalists during the War. These measures confiscated land, banished to different areas, and even attained them for treason. These laws, moreover, achieved their goals and after the war, a large portion of the nation called for their continuance. In calling for the laws' continuation, local communities exercised the notion of popular sovereignty by either instructing representatives or taking it upon themselves to enforce those laws. No unanimity existed among the Patriots for maintaining these laws after the war. Some Americans began calling for the repeal of anti-loyalist laws, basing their arguments not just on the ideological need to respect individual rights but also on the idea that the laws were unjust and unconstitutional. By calling for an adherence to written constitutions, those desiring repeal of the law also implicitly wanted a curbing of the excess of popular sovereignty. While the repealing of the laws in some cases took several years, they were eventually repealed and popular sovereignty was restrained. With the repeal of the laws and confining of popular sovereignty, Loyalists were one step closer to returning to their homes and becoming Americans.

## Chapter 7:

### From Traitor to Citizen: the Meaning of Allegiance

In his judicial opinion in the 1781 case of *Republica v. Samuel Chapman*, Pennsylvania Supreme Court Chief Justice Thomas McKean, stated that “Pennsylvania was not a nation at war with another nation; but a country in a state of civil war.”<sup>1</sup> The Chief Justice’s remarks established to the jury how Chapman, who served on a British vessel-of-war, could be accused of treason against Pennsylvania. Ultimately, the jury returned a not-guilty verdict. Still, Chapman, guilty or not, would forever be a despised Loyalist in Pennsylvania, and thus incapable of becoming a citizen of the state. While Chapman’s chance of reintegration was nonexistent, a different result occurred in 1784 when the New York and Massachusetts state legislatures enacted measures making formerly exiled Loyalists Peter and Henry Van Schaack citizens of their respected state.<sup>2</sup> One of the natural questions arising from these episodes was how did Loyalists change their status as traitors during the American Revolution to citizens in the Confederation? Historians studying loyalism or the confederation period have rarely asked this question. But the answer, or rather the process of how it occurred, was yet another important aspect of the reconstructing the Loyalists. Had former loyal subjects of George III not become citizens in the new American republics, there would have been no reintegration.

This chapter examines the transformation of Loyalists from traitors to citizens during the Revolutionary and Confederation periods. The civil war aspect of the

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<sup>1</sup> *Pennsylvania v. Samuel Chapman* in Alexander James Dallas, ed., *Reports of the Cases Ruled and Adjudged in the Courts of Pennsylvania before and since the Revolution*, 4 vols. (Philadelphia: T. Bradford, 1790), 1: 58. For Chapman’s biographical sketch, see Lorenzo Sabine, *Biographical Sketches of Loyalists of the American Revolution with an Historical Essay*, 2 vols (Boston: Little, Brown and Co., 1864), 1: 309.

<sup>2</sup> Henry C. Van Schaack, ed., *Memoirs of the Life of Henry Van Schaack* (Chicago: A. C. McClurg and Company, 1892), 184 and *The Life of Peter Van Schaack, LL.D.* (New York: D. Appleton and Co., 1842), 385-403.

Revolution McKean referred to in his charge forced the enactment and enforcement of treason legislation, but after the war it also played out in a vitally different fashion. During the military conflict, states attained or tried many Loyalists for treason. Yet, after the fighting, many former supporters of the crown became the fellow citizens of their former enemies. The importance of treason measures and enforcements against Loyalists played a political and cultural role, as well as a legal one. By attaining or trying suspected Loyalists for treason, patriot governments singled out to local communities those who openly supported England and were incapable of being members of the political and social community. With the conclusion of the war, numerous Loyalists desired to remain or return to their homes, with former friends of the King petitioned state legislatures seeking citizenship for themselves. This process of desiring and requesting citizenship became one of the surest ways for Tories to demonstrate to vengeful communities how they were repentant of their loyalism and were now willing to become viable members of the community. Interestingly, during this period, the very nature and understanding of allegiance changed. Because of the Revolution, the monarchical trappings of the English past were replaced by the more republican beliefs of the American present, the effects of which served to the interest of assimilating Tories.

### **English Development of Treason**

The Anglo-American world had ample experience with treason legislation and trials. England's understanding of treason was rooted, with some modifications, in the medieval statute of Edward III. Enacted in 1351, the measure declared seven actions to be treasonable, including adhering to the King's enemies, levying war against him, or aiding or comforting his enemies. Historians have ably demonstrated how English judges

expanded and created a common law definition of treason from the sixteenth through the eighteenth centuries.<sup>3</sup> This elastic understanding of treason enabled English monarchs to prosecute many forms of treason from actual attempts on the monarch's life to publication of supposedly seditious works. Not surprising, the greatest enforcement of this expanded definition came during the tumultuous reign of the Stuart dynasty, especially during the restoration reigns of Charles II and James II.<sup>4</sup> Several years after the overthrow of James II and in direct response to the Stuarts' overuse of treason charges, Parliament enacted in 1696 the Treason Trials Act. The law limited treason prosecutions by requiring the testimony of two witnesses, allowed the defendant a copy of the indictment and jury panel before the trial, and compelled the testimony of defense witnesses. Because of these features, the law should be considered as revolutionary as the fiscal and constitutional changes that accompanied the aftermath of the Glorious Revolution, but it rarely garners any attention from non-legal scholars.<sup>5</sup>

Leaders of the American Revolution were well acquainted with the English development of treason.<sup>6</sup> This knowledge served them well during the entire revolutionary crisis, as states enacted various treason measures to combat loyalism.

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<sup>3</sup> 25 Edward III st. 5, c2. Also see Sir Edward Coke, *The Third Part of the Institutes of the Laws of England Concerning High Treason, and other Pleas of the Crown, and Criminal Causes* (London: n.p., 1644; reprinted: Steve Sheppard, ed, *The Selected Writings of Sir Edward Coke* 3 vols, (Indianapolis: Liberty Fund, 2003), 2: 944-1053; William Blackstone, *Commentaries on the Laws of England* 4 vols. Stanley Kurtz, ed., (Oxford: The Clarendon Press, 1765; reprint, Chicago: University of Chicago Press, 1979), 4: 74-101. For treason trials in English history, see Thomas B. Howell, ed. *A Complete Collection of State Trials and Proceedings for High Treason and other Crimes and Misdemeanors from the Earliest Period to the Present Time*, 34 vols. (London: Longman, Hurst, 1809-1828).

<sup>4</sup> Bradley Chapin, *The American Law of Treason: Revolutionary and Early National Origins* (Seattle: University of Washington Press, 1963), 3-5. The first half of this chapter is heavily influenced by Chapin's work, even when I disagree with particular points. I will not be providing a detailed account of nuisances of treason legislation during the Revolution. The point being made here is how the states defined and enforced treason measures, the cultural stigma that it attached to Loyalists, and how this affected the process of reintegration and regaining citizenship.

<sup>5</sup> The Treason Trial Act can be found in 7 and 8 William III, ch. 3.

<sup>6</sup> J. Willard Hurst, "Treason in the United States," *Harvard Law Review* 58 (1944-1945): 246.

Before states established these measures on June 24, 1776, the Continental Congress suggested the colonies adopt legislation to punish as traitors those disaffected Americans who adhered to the British crown or provided aid and comfort to the enemy. Congress further recommended that the states punish these traitors “in such manner as to them shall seem fit.”<sup>7</sup> The Congressional resolution incorporated the restrictive definition of treason defined by the Statute of Edward III, and, while it did little to explain Congress’ sentiments on how the States could or should enforce their measures, this is not surprising, given the confederate scheme of the Union discussed in chapter two.<sup>8</sup> Congress also made the recommendation nearly two full weeks before declaring independence, making the resolution a significant step towards *de facto* independence. But the most significant aspect of Congress’ resolve was how it changed the American understanding of loyalism. Before this measure, Americans continued to assert their allegiance to the King, believing their resistance to Parliament a defense of English liberty. These assertions transformed any actions against the American cause into a matter of disagreement, while making questionable both legally and morally any type of punishment against non-supporters.<sup>9</sup> But the Congressional recommendation for state treason laws changed all of that. With its enactment, the separation of Patriot from Tory became crystallized and remained so for the rest of the conflict. Furthermore, the

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<sup>7</sup> *The Journals of the Continental Congress*, Worthington C. Ford, ed., 34 vols. (Washington, D.C.: Government Printing Press, 1904-1937), 5: 475 [hereafter cited Ford, *Journals of the Continental Congress*].

<sup>8</sup> This point is missed by Thomas P. Slaughter, “‘The King of Crimes:’ Early American Treason Law, 1787-1860,” in Ronald Hoffman and Peter J. Albert, eds., *Launching the ‘Extended Republic:’ The Federalist Era* (Charlottesville: University of Virginia Press, 1996), 54-136, when he deplores how the Continental Congress “made no effort to narrow the scope of the crime, define its terms, or provide details to the states.”

<sup>9</sup> Joseph Hawley to Elbridge Gerry, July 17, 1776, in Force, *American Archives*, Series 5, vol. 1: 403. Hawley told Gerry that the “Tories . . . knew very well the absurdity of punishing as high treason any acts or deeds in favour of the Government of the King of *Great Britain*, so long as we all allowed him to be King of the Colonies.”



recommendation suggested that anyone taking actions against a particular colony – soon to be state – committed a crime against a sovereign entity and would be punished as the state determined.

The states accepted the Congressional recommendation for treason laws and within the next year states authorized some measure defining the scope of the offense and the proof needed to declare an activity treasonous.<sup>10</sup> Only two historians have explored in any serious detail the Revolutionary era's treason legislation and have drawn two different conclusions. James Willard Hurst, the first scholar to critically review these laws, notes little difference between American and English treason legislation, arguing that while security of the state took precedence over individual rights, the parameters established by the Edward III statute remained essentially in place. In other words, no judicially constructed treason developed during the Revolution. Bradley Chapin, however, disagrees with Hurst. He acknowledges the lack of bloody assizes during the Revolution, as well as the serious attempts of state legislatures to follow English statutes, in particular the Treason Trials Act. But he notes the development of judicially constructed treason, contending that American judges expanded the understanding of levying war against the state and could have potentially led to excessive treatment.

Both Hurst and Chapin are essentially correct. The treason measures enacted in the initial years of the Revolution followed, in some form, the definition of the crime as put forth in the Edward III and Treason Trial statutes. Noticeable differences existed, however. For example, levying war against the King was replaced with levying war

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<sup>10</sup> For a list of when state enacted treason legislation, see Hurst, "Treason in the United States," 248 n35. For simplification and brevity, I make no distinction in the text between High Treason and Misprision of Treason. While the States made a statutory distinction between the two, in the enforcement and punishments little difference really existed.

against the state, and assisting England or English troops was considered aiding and comforting the enemy. Nor did states declare it treasonous to consider the death of the monarch. Virginia's 1776 treason law demonstrated this basic continuation of the two English measures. "That if a man do levy war against this commonwealth," the Virginia law stated, "or be adherent to the enemies of the commonwealth . . . giving to them aid and comfort and . . . be legally convicted of open deed by the evidence of two sufficient and lawful witnesses, or their own voluntary confession."<sup>11</sup>

The states crafted technical changes to the English statutory definition of treason to fit the republican nature of the new states; the civil war aspect of the Revolution, however, required a more ambiguous and loosely defined understanding of treason. Throughout the war, numerous Loyalists resisted the American cause through various and often peaceful means. They corresponded with British troops, counterfeited Continental money, moved into British occupied cities, or otherwise made some form of contact with the English. Their actions often did not fit into the proscribed and limited definition of treason found in the adopted English statutes. Thus, in order to secure the stability of their governments, while at the same time punish any supporter of the English, states sharpened the definition of treason.<sup>12</sup> North Carolina, in its treason measure of 1777, defined treason in not just the traditional sense, but also added "publicly and deliberately" speaking against the defense of the State or "endeavor to excite the People to resist the Government of this State" or discourage people to enlist in the military.<sup>13</sup> Pennsylvania,

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<sup>11</sup> William Hening, ed., *The Statutes at Large: Being a Collection of the Laws of Virginia from the First Session of the Legislature in the Year 1619*, 13 vols. (Richmond: J & G Cochran, 1821), 9: 168 [hereafter cited Hening, *Statutes of Virginia*].

<sup>12</sup> Hurst, "Treason in the United States," 257.

<sup>13</sup> Walter Clark, ed., *The State Records of North Carolina* 26 vols. (Raleigh: P.M. Hale, 1886-1907), 24: 9-12.

New Jersey, South Carolina, and Massachusetts followed North Carolina by defining these same actions as treason.<sup>14</sup> Most of the states included going over to British lines or garrisoned towns to the definition. After the conclusion of the War, this definition of treason proved a difficult obstacle in proving one's true allegiance.

The central question concerning the expanded definitions of treason was why did the state broaden the extent of the crime? Part of the explanation, discussed in more detail below, comes from the states responding to popular will. But other reasons account for the enlarged definition. One of the persistent strains of republican ideology held that both liberty and republics were fragile and in constant danger of tyranny. Loyalists, by simply being Loyalists, threatened the stability of the republican experiment – a lesson Americans learned all too well through the treason of Benedict Arnold – and were the personification of England's attempt to tyrannize America; as such they needed to be punished for their actions. Also, denoting a Loyalist as a traitor signified that the person lacked the virtue necessary to support republican government.<sup>15</sup>

The development of expanded American treason laws also led to a critical occurrence for the Revolution and its prosecution. The Congressional recommendation and the subsequent state laws furthered the creation of an American identity while solidifying the creation of a Loyalist identity, a process that began with the 1774

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<sup>14</sup> James T. Mitchell and Henry Flanders, eds., *Statutes at Large of Pennsylvania: 1681-1809* 18 vols. (n.p. WM Stanley Ray, 1896-1915): 8: 18-19, 9: 45-47; Thomas Cooper and David McCord, eds., *The Statutes at Large of South Carolina*, 10 vols. (Columbia: A.S. Johnston, 1836-1841) 4: 479, *The Acts and Resolves, Public and Private of the Province of Massachusetts Bay: To Which are Prefixed the Charters of the Province* 21vols. (Boston: Writing and Potter, 1869-1922), 9: 615; Peter Wilson, ed., *Acts of Council and General Assembly of the State of New Jersey* (Trenton: Isaac Collins, 1784), ch.5, 4.

<sup>15</sup> For the relationship between Arnold's treason and republicanism, see Robert A. Ferguson, *Reading the Early Republic* (Cambridge: Harvard University Press, 2004), 120-151; and Charles Royester, "The Nature of Treason: Revolutionary Virtue and American Reactions to Benedict Arnold" *William and Mary Quarterly* 36 (April 1979): 163-193.

Association. Robert Calhoun argues that the signing of the Association by former resisters represented the first real act of reintegration, since those who had originally rejected the Association could be welcomed back into the community upon signing the document.<sup>16</sup> This is certainly true, but a reverse side existed. While agreeing to the Association supposedly demonstrated support for the American cause, not following it – and many did not – confirmed a noticeable choice against the response to Great Britain. Patriots viewed this rejection as treason, tagging non-supporters as traitors or some other derivative. Yet, American Whigs believed non-Associators to be traitors. The Association branded violators of the agreement an “enem[y] of American liberty.”<sup>17</sup> Labeling Association violators as traitors and the often violent actions taken against them – such as the infamous tar and feathering – made support of England an actual aspect of treason easier for the States. This classifying helps explain how states added a more expansive definition to crime during the war.

The cataloging of treasonable actions suggested that a popular definition of the crime existed in Revolutionary America. While the legal definition could be as restrictive or expansive as legislation or the courts determined, the Patriotic public considered as traitors anyone not noticeably supporting the Revolution, even if those actions did not rise to the legal level of treason. When, for example, Thomas Hutchinson, the last royal governor of Massachusetts, and General Thomas Gage departed the colony in 1774, a number of the colony’s leading residents signed a farewell address. Despite

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<sup>16</sup> Robert M. Calhoun, “The Reintegration of Loyalists and the Disaffected” in Jack P. Greene, *The American Revolution: Its Characters and Limits* (New York: New York University Press, 1986), 51-74.

<sup>17</sup> “The Association” October 20, 1774 in Samuel Eliot Morison, ed., *Sources and Documents Illustrating the American Revolution and the Formation of the Federal Constitution, 1764-1788*, 2<sup>nd</sup> ed. (New York: Oxford University Press, 1972), 124. For the enforcement of the Association, see Chapter 5. For the numerous people refusing to sign the Association see Force, *American Archives*, *passim*.

being legal and in the absence of military conflict, the Patriot elements of those cities castigated the signers, forcing many of them to recant their sentiments or face punishment.<sup>18</sup> A similar event occurred in South Carolina in 1781. After the British evacuated Charleston and Patriot government reestablished itself, Governor John Rutledge issued a proclamation of pardon for any South Carolinian who supported the British during the occupation. The Governor, however, denied pardons to anyone who signed a congratulatory address to British General Henry Clinton and Admiral Marriot Arbuthnot, since those signers acted in “the most criminal manner.”<sup>19</sup> Nearly two weeks after the signing of the Declaration of Independence, Joseph Hawley pleaded to Elbridge Gerry for a “declaration of high treason” to accompany independence. Hawley feared that without treason legislation “our whole cause is every moment in danger” because Tories could work against the Americans with impunity. Finally, Hawley pointed out to his friend that a treason measure needed enactment because

the common understanding of the people, like unerring instinct, has long declared this; and from the clear discerning which they have had of it, they have been long in agonies about it. They expect that effectual care will now be taken for the general safety, and that all those who shall be convicted of endeavouring, by overt act, to destroy the State, shall be cut off from the earth.<sup>20</sup>

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<sup>18</sup> James H. Stark, *The Loyalists of Massachusetts and the Other Side of the American Revolution* (Boston: W B Clarke, 1907), 123-137, contains the petitions, as well the Patriot response.

<sup>19</sup> John Rutledge, “Proclamation” September 27, 1781, in R. W. Gibbes, ed. *Documentary History of the American Revolution Constituting of Letters and Papers Relating to the Contest for Liberty, Chiefly in South Carolina in 1781 and 1782* (Columbia: Banner Steam-Power Press, 1853), 175-178; Edward McGrady, *The History of South Carolina in the Revolution, 1780-1783* (New York: The McMillan Company, 1902), 521- 525; Jerome J. Nadlehaft, *The Disorders of War: The Revolution in South Carolina* (Orono, ME: The University of Maine at Orono Press, 1981), 71.

<sup>20</sup> Hawley to Gerry in Force, *American Archives*, 1: 403. Also see George Washington to Nicholas Cooke, January 6, 1776 in John C. Fitzpatrick, ed., *The Writings of George Washington*, 39 vols. (Washington: Government Printing Office, 1931-1944), 4: 216-217 and “A Whig” address to the *Pennsylvania Packet* in James Frank Moore, ed., *Diary of the American Revolution from Newspapers and Original Documents* (New York: Charles Scribner, 1859), 166-170.

In other words, Hawley believed treason legislation was necessary in part because the people clamored for it. William Livingston, the Patriot governor of New Jersey and a notorious Tory-hater, suggested to his state's legislature that anyone who even contemplated the defeat of Patriots should be considered traitors and, as such, that it deserved to be added to the list of treasonable activities.<sup>21</sup> In counseling America to secure independence in *Common Sense*, Thomas Paine advocated the necessity of treason legislation. Without formal independence, Americans could not punish those working against it. "There is no such thing as treason" without independence, wrote Paine, and because of this "every one thinks himself at liberty to act as he pleases. The Tories dared not have assembled offensively had they known that their lives, by that act were forfeited." To help Americans punish Loyalist as traitors, as well as noting how treason legislation served as a social marker between Patriot and Tory, Paine recommended that a "line of distinction should be drawn," between captured English soldiers and Loyalists. Rather ominously, he advised that "the first are prisoners, but the latter traitors. The one forfeits his liberty, the other his head."<sup>22</sup>

During the Revolution, this popular understanding of what constituted treason was important because, as previously discussed, the new state legislatures responded to popular will on a previously unprecedented level. The more expansive definition of treason during the Revolution that Chapin has detected can be attributed more to a legislative response to popular will than any judicial interpretation. When this popular

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<sup>21</sup> William Livingston to the Legislature, February 23, 1777, in Carl E. Prince, ed., *The Papers of William Livingston*, 5 vols. (Trenton: New Jersey Historical Commission, 1979-1987), 1: 254-260, especially 255-256.

<sup>22</sup> Thomas Paine, "Common Sense," Thomas P. Slaughter, ed. *Common Sense and Related Writings* (Boston: Bedford, 2001), 112.

sovereignty combined with the states' need to preserve and protect themselves and their residents, as well as sustain the Revolution, these treason laws rank among the more powerful and potentially arbitrary weapons in their arsenals against Loyalists. The potential power of these treason laws, moreover, can be demonstrated in the punishment they could inflict upon the traitor. Not surprising, execution remained the most commonly legislated form of punishment against traitors.<sup>23</sup> Most states, however, allowed for – and often used – other punishments for treason convictions. Instead of the hangman's noose, convicted traitors could serve in the Continental lines or (more commonly) aboard an American ship of war for several years. While the length of service was longer than the terms of the regular military forces, it beat the alternative as demonstrated by the fact that many convicted Loyalists served in the Patriot army.<sup>24</sup> Banishment also became a favorite alternative to death for State legislature, as many Loyalists were forced out of the county or state because of treasonable actions – although many left on their own accord. Property confiscation, however, became the most common alternative form of punishment for treason convictions.<sup>25</sup> Georgia's treason act

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<sup>23</sup> A significant difference emerged between the treason executions of England and Revolutionary America. The English punishment called for, as Blackstone described, “that the offender be drawn to the gallows, and not be carried or walk; though usually (by connivance at length ripened by humanity into law) a sledge or hurdle is allowed . . . 2. That he be hanged by the neck and then cut down alive. 3. That his entrails be taken out and burned, while he is yet alive. 4. That his head be cut off. 5. That his body be divided into four parts. 6. that his head and quarters be at the King's disposal.” Blackstone, *Commentaries*, 4:92-93. No state adopted this rather brutal and brutish punishment, opting instead for the simple hanging. the New York legislature explained the reason behind the change: “the judgment directed by the law of England . . . in all cases of High Treason . . . are . . . marked by circumstances of Savage Cruelty, unnecessary for the Purpose of public Justice, and manifestly repugnant to that Spirit of Humanity, which should ever distinguish a free, a civilized, and Christian People.” Quote in Chapin, *American Law of Treason*, 45.

<sup>24</sup> *Ibid.*, 70.

<sup>25</sup> For the link between treason and confiscation see Anne Ousterhout, “Pennsylvania Land Confiscation during the Revolution,” *Pennsylvania Magazine of History and Biography* 102 (July 1978): 328-343; Also see A. B. Pruitt, ed., *Abstracts of Sales of Confiscated Loyalists Land and Property in North Carolina* (A.B. Pruitt, 1989); John W. Tyler, *Connecticut Loyalists: An Analysis of Loyalist Land Confiscations in Greenwich, Stamford and Norwalk* (New Orleans: Polyanthus, 1977).

of 1782, for example, made confiscation rather than death the primary form of punishment while other states made property forfeiture automatic with a treason conviction or attainment.<sup>26</sup> Eight states made the confiscation of property a punishment for treason.<sup>27</sup> Instead of execution, Tories in most states lost all their property, although states attempted to provide some property or victuals for the traitor's family.<sup>28</sup>

Several reasons explain why confiscation became the preferred punishment for treason. First, it served the interest of the State to take the property for whatever purpose it needed it, which was mostly fiscal; having the former owner a convicted or attained traitor made the confiscation easier. Second, given the strong belief in the link between property and freedom that permeated the eighteenth-century Anglo-American world, the stripping away of a traitor's property also removed his freedom and connections to the community. In many ways, too, the confiscation of property for treason was worse than death because, while execution ended one's life, confiscation symbolically ended the comforts of life Loyalists had always known, while leaving them alive. As noted in the first chapter, the emotional desire to return to their home was a powerful force in the Loyalist desire to reintegrate into American society; yet, this desire was often accompanied by despair because of loss of their former lives and properties.<sup>29</sup> This punishment, while perhaps not anticipated by legislatures, was nonetheless a side-effect of treason-induced confiscation. And third, confiscation of an enemy's property occurred

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<sup>26</sup> For Georgia's Confiscation Act, see *A Digest of the Laws of the State of Georgia* (Philadelphia: Aitken, 1801): 242-250. The state also enacted a punitive Amercing measure. See *ibid.*, 250-251.

<sup>27</sup> Those states were Virginia, Maryland, Rhode Island, New York, Delaware, North Carolina, Connecticut, and Georgia.

<sup>28</sup> For examples, see Clark, ed., *State Records of North Carolina*, 24: 209-214; Samuel Hazard, *Colonial Records of Pennsylvania*, 16vols. (Philadelphia: Joseph Severns, 1853-1860), 12: 58.

<sup>29</sup> Mrs. DeLancey to George Clinton, August 5, 1783, in Hugh Hastings, ed., *Public Papers of George Clinton: First Governor of New York, 1777-1795, 1801-1804*, 10 vols. (Albany: Oliver A. Qualyle, 1899-1914), 8: 233-234.



often in early modern warfare and received sanctioning by the authorities on the law of nations.<sup>30</sup>

Aside from legislatively prescribed definitions of treason, state legislatures also enacted attainder legislation. Although the state constitutions of Maryland and Massachusetts expressly forbade the passage of any attainder laws since they were considered unjust because of their potential to deny of jury trials, during the Revolution, this prohibition appeared as nothing more than a paper barrier.<sup>31</sup> States relied on two forms of attainder bills. The first, which five states employed, damned the Loyalists as traitors and deprived them of any trial and often banished them or confiscated their property; in many cases, confiscation or banishment were the purpose behind the attainment, but these cases also stated the treasonous activities of the attainted made the measures necessary. The second form, adopted by four states, singled out Loyalists and either indicted them for treason or banished them or confiscated their property. Unlike its more absolute form, these measures permitted the attained Tory some period of time to answer the charge and stand trial. If that interval ended, the attainment would take effect and the Loyalist would be guilty of treason. Because of its automatic and near absolute authority, attainder legislation was the strongest legislative weapon any state could wield against Loyalists. Condemning a suspected Loyalist for treason without benefit of a trial removed any chance of a jury rendering a not guilty verdict, as sometimes happened with

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<sup>30</sup> Vattel, *The Law of Nations; Or the Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (New York: Berry and Rogers, 1787), Book 3: 481-484. This citation is to the first known American printing of the work.

<sup>31</sup> The constitutions of Maryland and Massachusetts prohibited attainders while New York's allowed them to be used only during the Revolutionary War. Francis Thorpe, ed, *Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America*, 7 vols. (Washington D.C: Government Printing Office, 1909): 3: 1686-1702, 1888-1922; 5: 2623-2638; Leonard Levy, *Origins of the Bill of Rights* (New Haven: Yale University Press, 1999), 68-79.

the other form of attainders. More important, however, attained Loyalists carried with them a social stigma, or what Chief Justice McKean called the “crimson colour of the most dangerous and fatal consequence to society,” which identified to local communities those individuals of Tory leanings who could not to be trusted as a member of the body politic. Finally, the confiscation of the attaindee’s property and a forced banishment often accompanied both forms of treason attainders.<sup>32</sup>

While nearly every state enacted bills of attainder declaring some Loyalists traitors, one state’s attainders draw particular attention. Pennsylvania, which had some of the harshest anti-Loyalist laws in general, conditionally attained nearly 500 Loyalists mostly through proclamations issued by its Executive Council.<sup>33</sup> Of these, 118 were sent to trial but only four were executed. Practically all suffered either the confiscation of property or banishment (or both). In 1802, two decades after Pennsylvania attained its last Loyalist, the state legislature published a list of those attained Loyalists, known as “The Black List.” The importance and power of attainment is demonstrated in that the purpose and need for this list arose in response to an election dispute over whether traitors attained during the Revolution could vote in elections if they had not been pardoned or the attainment repealed. The “Black List” confirmed that Pennsylvania not only attained a large number of Loyalists – as did most states, New York in fact attained

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<sup>32</sup> Chapin, *American Law of Treason*, 78-80. The four states that used conditional attainders were Delaware, North Carolina, Pennsylvania, and Virginia. For their individual acts, see *Laws of the States of Delaware*, 3: 636-643; Clark, ed., *State Records of North Carolina*, 24: 123-124; *Statutes at Large of Pennsylvania*, 9: 201-215; Hening, ed., *Statutes of Virginia*, 9: 463-464. States that passed the more strenuous attainders were New Hampshire, New York, Massachusetts, South Carolina. For their individual acts see Henry H. Metcalf, et al, eds., *Laws of New Hampshire, Including Public and Private Acts and Resolves and the Royal Commission and Instructions with Historical Descriptive Notes*, 10 vols. (Concord: N. He. Evans Printing Co., 1904-1922), 4: 191; *Acts and Resolves, Massachusetts Bay*, 5: 966-967; *Laws of the State of New York, Since the Revolution*, 2 vols. (New York: Thomas Greenleaf, 1792) 1: 173-184.

<sup>33</sup> The dates of those measures and the number of those attained under each are Pennsylvania’s various attainders can be found in *Pennsylvania Archives*, 3<sup>rd</sup> series, 10: 519-544.

over 1,000 – but that the stain of this treason carried a social stigma with the Loyalists throughout the rest of their lives if they remained in America.<sup>34</sup>

Americans agreed on the need to punish Loyalists as traitors, but some noticeable disagreements emerged during the war as to the severity of their punishment. This quarrel reflected the difference in post-war America over Loyalist assimilation as those who called for stringent punishment of treasonous Loyalists, more often than not, resisted any reintegration while those desiring less strenuous sentencing supported the post-war return of Loyalists. Those calling for strict enforcement of treason laws did not advocate the wholesale execution of Loyalists; such recommendations would be both inhumane and impossible to carry out. And it does not appear ever to have crossed their minds. Yet, advocates for stronger punishment lost no love for Loyalists and desired a strong antidote to counter-act the poison of traitorous activity. Allen Jones, a General in the North Carolina militia, explained to Governor Thomas Burke that “hanging, about a dozen [Loyalists], will have exceedingly good effect, in this State, and give stability to our new government. They seem to have been designed for this purpose by Providence.”<sup>35</sup> Also in North Carolina, a petition to its legislature from Mecklenburg County, criticized the State’s 1777 confiscatory attainder because “the offender is very inadequately punished & the public in no sort indemnified for the injuries it has sustained

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<sup>34</sup> “The Black List: A List of Those Tories who Took Part with Great-Britain in the Revolutionary War, and were Attained of High Treason” (Philadelphia: n.p. 1802). The best statistical work on Pennsylvania’s treason prosecutions is Anne Ousterhout, *A State Divided: Opposition in Pennsylvania to the American Revolution* (Westport, CT: Greenwood Press, 1987), 279-299, 319-323. Also useful is Thomas R. Meehan, “The Pennsylvania Supreme Court in the Law and Politics of the Commonwealth, 1776-1790” (PhD dissertation, University of Wisconsin, 1960), 124-205.

<sup>35</sup> Allen Jones to Thomas Burke, August 6, 1777, in Clark, ed. *State Records of North Carolina*, 11: 561-562.

by his unnatural guilt.”<sup>36</sup> Joseph Reed, Attorney General of Pennsylvania and eventual President of that state, argued against pardoning two Loyalists, John Robert and Abraham Carlisle, sentenced to death. Reed had, he said, “no Difficulty in Suggesting as my Opinion a speedy Execution of both the Criminals” since both were given a fair and impartial trial (and they were).<sup>37</sup> Gouverneur Morris thought the “spirit of the Tories” in his home state of New York “is entirely broken in this State.” Morris cautioned that were he wrong, he soon would not be as Loyalists “shall have a few more executions than which nothing can be more efficacious . . . it is necessary to disperse the victims for public justice” throughout the state “for nothing but ocular demonstration can convince these incredulous beings that we do really hang them.”<sup>38</sup> In Massachusetts, “Plain Truth” advised against any lenient treatment for Loyalists who remained in Boston after the British evacuation in 1776. The anonymous author admitted that some of the remaining Tories could be converted to the American cause, but most would always remain enemies.<sup>39</sup>

Historians have assigned all sorts motivations behind the desire for strict punishments for treason. Some view the enforcement as having a class or ethnic dimension or as another battleground in the political struggles in a particular state, while one has labeled treason prosecution and trials as “an outlet for wartime vengeance” that

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<sup>36</sup> “Remonstrance of Mecklenburg County,” October 1777, in Clark, ed., *State Records of North Carolina*, 14: 345-346.

<sup>37</sup> Quote from Meehan, “The Pennsylvania Supreme Court,” 170.

<sup>38</sup> Gouverneur Morris to Alexander Hamilton, May 16, 1777, in Harold Syrett, *et al*, eds., *The Papers of Alexander Hamilton*, 26 vols. (New York: Columbia University Press, 1957-1981), 1: 230-232.

<sup>39</sup> “Plain Truth to the Justices empowered by the Court to deal with Tories,” in *The Independent Chronicle*, July 11, 1776, quoted in David Maas, “The Return of the Massachusetts Loyalists” (PhD dissertation, University of Wisconsin, 1972), 182.

“reflected the blood lust endemic to the Revolutionary scene.”<sup>40</sup> Oddly enough, all of these explanations ignore what appears clear from the evidence: that those desiring the strict punishment did not do so for revenge. Rather it derived from a desire to ensure Loyalist obedience to the new state governments; hence, punishment was a form of deterrence. Another important factor for the punishments was the fair and impartial nature of the trials. Because of this advocates argued that the subsequent punishment was legal and just.

Interestingly, those arguing for a less rigorous punishment for treasonous activity relied on the very procedure of identifying and trying Loyalists to lessen the punishment. The first step in this process was in the actual wording of treason legislation. Thomas Jefferson based his proposed treason law for Virginia on the restrictive nature of the Edward III statute and the Treason Trials Act. He admitted that “accuracy, brevity, and simplicity” were his goals for the legislation, as well as avoiding the expansive use of crime under English common law. In his retirement years, Jefferson commented that he constructed his proposed law in “technical terms of the law, so as to give no occasion for

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<sup>40</sup> The quote is taken from Slaughter, “The King of Crimes,” 54-136, especially 75-78. Several other examples of these class, ethnic, or revenge based arguments for punishment are J. M. Coleman, *Thomas McKean: Forgotten Leader of the Revolution* (Rockway, N.J: American Faculty Press, 1975), 190-191; Jackson Turner Main, *The Sovereign States, 1775-1783* (New York: Franklin Watts, 1973), 275-317; Hurst, “Treason in the United States,” 226-272, especially 246-272; Thomas Meehan, “Court, Cases, and Counselors in Revolutionary and Post-Revolutionary Pennsylvania,” *Pennsylvania Magazine of History and Biography* 91 (1967): 3-34. For the revenge based arguments see Geoffrey Seed, *James Wilson* (Millwood, NJ: KTO Press, 1978). Chapin, *American Law of Treason*, the standard work on the subject, is more undecided on the question of motivation. He argues that some cases were clearly just, such as the Roberts and Carlisle trials, but that others were clearly motivated by on the factors mentioned. See chapter four of *American Law of Treason*. A notable exception to this is Robert Calhoon, *The Loyalists in Revolutionary America, 1760-1781* (New York: Harcourt, Brace, Jovanovich, 1973), 306-312. For a recent argument which places the trial within the millennial themes of the Revolution see Peter C. Messer, “‘A Species of Treason & Not the Least Dangerous Kind:’ The Treason Trials of Abraham Carlisle and John Roberts,” *Pennsylvania Magazine of History and Biography* 123 (Oct. 1999): 303-332.

new questions” to its meaning.<sup>41</sup> Thomas McKean, who probably tried more treason cases than any other judge in revolutionary America, noted that “no offense can be adjudged High Treason unless it be clearly and without argument or influence within the meaning of some *Act of Assembly*, for no such act can be extended by Equity.”<sup>42</sup>

Oaths of allegiance and pardons were additional methods used to lessen the punishment for treason. In the attainder bills of four states or treason legislation of essentially all, suspected Loyalists were afforded the opportunity to take an oath of allegiance to the state. Upon taking the oath and becoming a legal citizen, the state voided the attainder.<sup>43</sup> Some historians have questioned both the sincerity of some of the oath takers as well the importance of oaths in Revolutionary America. These arguments often miss that upon taking the oath, the state or enforcement committee generally left the person alone. To be sure, some individuals swore the oath simply for expediency, thereby diluting the significance of an oath; yet, just the act of taking the oath was enough to signify acceptance of the American cause.<sup>44</sup> In a similar vein, legislatures and governors frequently offered pardons or “acts of grace” to Loyalists. These pardons often followed in the wake of a British evacuation of a particular area as in the case of

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<sup>41</sup> Thomas Jefferson to George Wythe, November 1, 1778, in Andrew Lipscomb, ed. *The Writings of Thomas Jefferson*, 20 vols. (Washington D.C.: Government Printing Office, 1903-1904), 1: 216-218, 257.

<sup>42</sup> “Letter or Opinion of C. J. McKean to President Reed,” 1779, in *Pennsylvania Archives*, Series 1, 7: 664-665, Emphasis is McKean’s.

<sup>43</sup> For examples, see Victor Hugo Paltsits, ed., *Minutes of the Commissioners for Detecting and Defeating Conspiracies in the State of New York: Albany County Sessions, 1778-1781*, 3 vols. (Albany: J. B. Lyon; reprint; Bowie, MD: Heritage Books, 2001), vols. 1 and 2.

<sup>44</sup> Michael Kammen, “The American Revolution as a *Crise d Conscience*: The Case of New York,” in Richard M. Jellison, ed., *Society, Freedom, and Conscience: The American Revolution in Virginia, Massachusetts, and New York* (New York: Norton, 1976), 125-189; Jonathan Clark, “The Problem of Allegiance in Revolutionary Poughkeepsie,” in David Hall, John Murrin, and Thad Tate, eds., *Saints and Revolutionaries: Essays on Early American History* (New York: Norton, 1984): 285-318; Wayne E. Lee, *Crowds and Soldiers in Revolutionary America: The Culture of Violence in Riot and War* (Gainesville: University Press of Florida, 2001), 63, 168, and 253 n17. James Kettner, *Development of American Citizenship, 1607-1877* (Chapel Hill: University of North Carolina Press, 1978), 213, notes that oath takers were left alone after taking the oath.

Rutledge's proclamation in South Carolina discussed earlier. Some pardons held different but generally humane reasons behind their issuance such as if a suspected traitor were elderly, very young, insane, or had to support a large family. Others required the pardoned traitor to join the Continental Army and some were issued just before the convicted traitor faced the gallows.<sup>45</sup> A good number of pardons were issued out a belief that some Americans who had joined the British had done so because they were scared or otherwise deluded into it. Some suspected Loyalists even petitioned for pardons claiming they were seduced. The North Carolina State archives contain a petition from the "Sundry Inhabitants of the County of Surry," in which the county begs for the pardoning of the state legislature. They claimed that "wicked and designing" men forced them to support England. Once they realized their mistake, they "withdrew ourselves from having any Connection with so unwarrantable Proceedings." All the inhabitants desired, they claimed, was "to be once more admitted to the Priviledges [sic] of other Citizens of this State."<sup>46</sup> Additionally, governments issued some pardons in hopes of quelling any potential or actual violence between Patriots and Loyalists and, as American General, Nathaniel Greene, stated, "to encourage the return of the Tories," thus making some of these pardons of great importance to the process of assimilation.<sup>47</sup> Whatever the

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<sup>45</sup> Peter Hogg to Governor Nelson, August 2, 1781, in William P. Palmer, ed. *Calendar of Virginia State Papers and Other Manuscripts, from April 1, 1781 to December 31, 1781*, 3 vols. (Richmond: James E. Goode, 1881), 2: 284-285; *Calendar of Historical Manuscripts relating to the War of the Revolution*, 2 vols. (Albany: Weed, Parsons, and Company, 1868), 2: 125; Hazard, *Colonial Records of Pennsylvania*, 12: 222, 309, 778; Chapin, *American Law of Treason*, 70.

<sup>46</sup> Peter Hogg to Governor Nelson, August 2, 1781, in William P. Palmer, ed., *Calendar of Virginia State Papers and Other Manuscripts, from April 1, 1781 to December 31, 1781*, 3 vols. (Richmond: James E. Goode, 1881), 2: 284-285 [hereafter cited Palmer, *Virginia State Papers*]; *Calendar of Historical Manuscripts relating to the War of the Revolution* 2 vols. (Albany: Weed, Parsons, and Company, 1868), 2: 125; Hazard, *Colonial Records of Pennsylvania*, 12: 222, 309, 778; Chapin, *American Law of Treason*, 70.

<sup>47</sup> Quote take from Jereome D. Nadelhaft, *The Disorders of War: The Revolution in South Carolina* (Orono: University of Maine at Orono Press, 1981), 71; Samp. Mathews to Thomas Nelson, July 7, 1781, in Palmer, *Virginia State Papers*, 2: 207; Colonel John Syme to the Governor, January 9, 1782, Colonel L. Wood, Jr. to the Governor, February 8, 1782, William Reynolds to the Governor, December 17, 1782,

reasoning, the crimes of the Loyalists would be forgiven and a pardon issued upon the taking an oath of allegiance.

The most interesting method of limiting the scope of punishment for treason, however, can be found in the treason trials. Although numerous Loyalists were attained or arrested for treason, many still faced a jury trial. At first glance, treason trials would seem a bastion for Patriots seeking the fullest possible punishment for Loyalists. In part, this comes from the type of courts sometimes used to hear treason cases. While regular criminal courts actually heard the bulk of treason cases, in some areas, particularly in New York where the two armies remained encamped for the entire war, military court martials were temporarily used. States also resorted to trying Loyalists through courts of Oyer and Terminer when necessity arose.<sup>48</sup> Largely forgotten and defunct in the modern world, state governors during the revolution often possessed the ability to commission these courts.<sup>49</sup> Oyer and Terminer sittings were important for the prosecution of Loyalists because they did not have scheduled meetings like other judicial courts and thus could be summoned in relative haste – although it must be noted that in several states, such as Pennsylvania, their normal criminal courts were known as oyer and terminer. This swiftness allowed Patriots to try Loyalists quickly which could help temper any potential disaffection or outright Loyalism in a local area. It would seem an easy

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Palmer, *Virginia State Papers*, 3: 12,56, 251, 400. Livingston to the Assembly, May 28, 1777, *Papers of William Livingston*, 1: 341-342.

<sup>48</sup> Chapin, *American Law of Treason*, 63.

<sup>49</sup> “Commission of Oyer and Terminer issued by Governor Nelson,” June 1781; Benjamin Harrison to Garret Van Meter, December 15, 1781, in H. R. McIlwaine, ed., *Official Letters of the Governors of the State of Virginia*, 3 vols., *The Letters of Thomas Nelson and Benjamin Harrison* (Richmond: Virginia State Library, 1929), 3: 5-6, 111; *Selections from the Correspondence of the New Jersey Executive, from 1776-1786* (Newark: Newark Daily Advertiser, 1848), 63-67; “An Ordinance Authorizing the Governor, or Commander-in-Chief, . . . to Issue Commissions . . . for Courts of Oyer and Terminer,” 1779 and “An Act Reviving Courts in Oyer and Terminer in Several Districts,” 1782 in Thomas Cooper and David McCord, eds., *The Statutes at Large of South Carolina*, 10 vols. (Columbia: A.S. Johnston, 1836-1841), 4: 463-465.



conclusion to draw that the potential speed of the session and trials would lead to unjust decisions and an undue harshness regarding punishments and indeed this often worried state's leaders. Such was not the case, however. While some governors had trouble finding judges to fill the benches, and many of those judges complained about the irregularity of the courts meeting and the distances they sometimes had to travel to hold sessions, most trials were nonetheless fair and just.<sup>50</sup>

Aside from the types of courts, the actual judicial process limited potential punishment.<sup>51</sup> Following the English Treason Trial Act, many Loyalists arrested for treason were given *habeas corpus* and were then sent to grand juries which determined their indictment.<sup>52</sup> Furthermore, because the war disrupted the frequency of court meetings, some courts released accused Loyalists on parole as long as they provided two sureties for their good behavior with promises to return or were transferred to out of state jails; bail, however, was almost never granted.<sup>53</sup> Accused Loyalists were also provided copies of the treason indictment as well a copy of the jury lists in reasonable time, although courts often considered one day reasonable.<sup>54</sup>

Most treason trials, moreover, allowed the accused to have defense counsel. Fortunately for some Loyalists, especially in Pennsylvania, "the accused often had

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<sup>50</sup> McIlwaine, ed. *Official Letters of the Governors.*, 171-172; William H. Browne, et al., eds., *Archives of Maryland*, 72 vols. (Baltimore: Maryland Historical Society, 1883 - 1972)15: 488; Samuel Hazard, ed. *Pennsylvania Archives*, first series (Philadelphia: Joseph Stevenson, 1852), 6: 715-716, 744, 750, 769-770; Chapin, *American Law of Treason*, 63-64.

<sup>51</sup> The best description of the process of treason trials is Chapin, *American Law of Treason*, 66-71. The following paragraphs barrows heavily from that section.

<sup>52</sup> See, for example, Constance A. Levingson and Louise C. Levingson, eds., *Rockingham County, Virginia Minute Book, 1778-1792*, part one, 1778-1786 (Harrisburg, VA: Greystone Publishers, 1985-1987), 28.

<sup>53</sup> *Minutes of the Council of Safety of New Jersey* (Jersey City: John H. Lyon, 1872), 38, 58-59, 176 [hereafter *New Jersey Council of Safety*]; *Virginia State Papers*, 2: 163-164, 551; *Archives of Maryland*, 21: 160, 486. On bail, see *Pennsylvania v. Joseph Griswold*, in Hazard, *Colonial Records of Pennsylvania*, 12: 7, 85, 566; *New Jersey Council of Safety*, 245, 270; *Archives of Maryland*, 26: 155-156.

<sup>54</sup> *Pennsylvania v. Abraham Carlisle* in Dallas, *Reports and Cases*, 1: 35-38.

brilliant council,” meaning that the defense attorneys provided ample legal protection to the accused. Through defense of their clients, these attorneys successfully wielded the restrictive understanding of treason by making continual references to the more restrictive definitions of treason found both in the English and American statutes. Not only did they rely on the more restrictive definition, defense attorneys challenged various aspects of the trial that probably would have made a conviction and the expanded definition of treason easier. They questioned the types, uses, and quality of evidence, but, if a jury returned a guilty verdict, the defense often petitioned the court to overturn the verdict (albeit with limited success). What the defense attorneys made certain was that treason cases served as “eloquent testimony of a desire to dispense justice according to established rules even in time of high political excitement.”<sup>55</sup>

Judges also played a critical role in restricting the understanding of treason. Members of the bench helped shape the contours of treason’s definition through their charges to the jury where they breathed life into the meaning treason according to the statutes and through their evaluation of evidence. Judges, in many ways, more than statutes or defense attorneys, gave treason laws their definition and scope. Take, for instance, a statement McKean delivered to the condemned traitor, John Roberts. The Chief Justice remarked that

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<sup>55</sup> The quotes come from Chapin, *American Law of Treason*, 67, 69. For the trials that defense attorneys do at least one of the actions mentioned, see *Pennsylvania v. John Roberts*, and *Pennsylvania v. Joseph Malin* in Dallas, *Reports and Cases*, 1: 39-40, 33-35; *Connecticut v. Gurdon Whitman*; and *Virginia v. John Davis* in Levingson, *Rockingham County Minutebook*, 65.

Treason is a crime of the most dangerous and fatal consequence to society, it is of a most malignant nature; it is of a crimson colour, and of a scarlet dye. Maliciously to deprive one man of life merits death, and blood for blood is just restitution. What punishments then must he deserve, who join the enemies of his country and endeavors the total destruction of the lives, liberties, and properties of all his fellow citizens?<sup>56</sup>

Because of the serious nature of the crime involved, McKean and other judges purposely maintained a restrictive understanding of treason. More often than not, they allowed juries to consider only the narrowest definitions to be classified as treasonous. While fighting a militia was considered levying war against a state, accidentally joining American forces in belief that they were British troops was not. Providing the British with information about American military forces often did not bring about treason trials but going over to the English did.<sup>57</sup>

In Virginia, the ability of judges to shape the contours of treason laws became obvious in the 1782 case of *Caton v. Commonwealth* where the state's Court of Appeals nearly declared the Old Dominion's treason law unconstitutional because of a procedural conflict. The case centered on a conflict between the Commonwealth's treason statute and the pardoning process contained in its Constitution. According to the Virginia's Constitution, the Governor could, with the advice of his Council, issue pardons and reprieves. Yet, the Constitution allowed exceptions to this when House of Delegates carried out the prosecution or the "law should otherwise direct" that the Governor be denied that authority. The Treason Act, however, stated that "in no wise should the Governor "have or exercise a right of granting Pardon" for treason convictions and, instead, vested that authority in the House and Senate. The Court validated the

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<sup>56</sup> *Pennsylvania v. John Roberts*, *ibid.*

<sup>57</sup> *New Jersey Council of Safety*, 275; *Pennsylvania v. Abraham Carlisle* and *Pennsylvania v. Malin* in *Dallas, Reports and Cases*, 1: 35-38, 33; Chapin, *American Law of Treason*, 72-75.

constitutionality of the treason law (although they reserved the right to declare future laws unconstitutional).<sup>58</sup>

In the end, the American Revolution did not have anything resembling a bloody reign of terror where Loyalists lost their heads on a daily basis; if anything, the direct opposite occurred. If these treason trials – such as *Caton v. Commonwealth* – demonstrated nothing else, they reveal, to a surprising degree, the lengths Americans went to maintain order and justice in a time of political upheaval and civil war. To be sure, the American Revolution had its share of horrible violence where chaos ruled the day. This is especially true of the frontier regions of the South, where outright atrocities occurred, and in the extra-legal actions patriots visited upon Loyalists everywhere during and after the Revolution.<sup>59</sup> Yet, these incidents aside, there is a noticeable lack of true radicalism. Multiple factors explain this lack of radicalism and extreme violence that was more characteristic of the French Revolution. First, Americans maintained too great a respect for the rule of law to abandon it for bloodlust. Even though, as the last chapter demonstrated, the concept of the law was changing because of the Revolution, its fundamentals persisted. Second, the American Revolution was a civil war where families were torn apart and forced to combat one another. This made mass execution of one side was simply unimaginable as it would permanently end any chance of conciliation. Third, and much more pragmatic, even had Americans wanted to forever rid themselves of Loyalists through heavy use of the death penalty – although no evidence exist to prove they wanted to – they could not risk any large scale execution of Loyalists. Not only did

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<sup>58</sup> *Caton v. Commonwealth* (also known as The Case of the Prisoners).

<sup>59</sup> For documented examples of these violent episodes, see Catherine Crary, *The Price of Loyalty: Tory Writings from the Revolutionary Era* (New York: McGraw-Hill, 1973), 55-111, 201-293.

they not have the means of carrying out such a task but the fact that the British army could just as easily execute Patriots in retaliation probably played heavily in the minds of political leaders.<sup>60</sup> Fourth, the efforts of judges and defense attorneys also ensured low numbers of executed Loyalists. Finally, as will be detailed later in the chapter, the lack of large numbers of executions can be explained because many were banished and/or had their property confiscated. In Pennsylvania, which has the most surviving evidence of treason trials, only four Loyalists met the hangman. Altogether, Patriots executed a total of sixty-one Loyalists for treason. In New England, only six Tories were executed, twenty-six were sentenced to death in the middle states (including the four in Pennsylvania), and twenty-nine met their end in the South.<sup>61</sup> The regional differences in the number of executions reflects the degree of military action in that area. Not surprisingly, the more military action in a region the higher the number of Loyalist executions.

The American experience with treason legislation and enforcement during the Revolution was critical in the process in the reintegration. During the war treason laws and trials not only punished Tories but they also helped clarify and identify to local communities who among them ranked as Loyalists. When the war ended and Loyalists desired to return, much of the groundswell of opposition in the various towns and states to their return was based on the idea that the Loyalists were traitors, even if most of those

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<sup>60</sup> Washington to William Livingston, December 11, 1777, in Fitzpatrick, ed., *Writings of Washington*, 10: 149-150. In this letter, Washington advised that Tories captured by the military should not be tried for treason. He admitted that their actions were treasonous, but, since they did not actively choose the Patriot side and then defect, they should not meet a traitor's fate.

<sup>61</sup> State by state analysis breakdowns: Connecticut, 4; Massachusetts, 2; New Hampshire, 0; New York, 15; New Jersey, 6; Delaware, 1; Rhode Island, 0 (although two were murdered); Maryland, 4; Virginia, 4; North Carolina, 5; South Carolina, 20; Georgia, 0. This information is taken from Wallace Brown, *The King's Friends: The Composition and Motives of the American Loyalist Claimants* (Providence: Brown University Press, 1965), 79, 65, 47, 34, 115, 134, 183, 158, 169, 198, 215.

returning had never been tried for the crime. In many cases, the only treasonous activity of those Loyalists wanting to return was remaining loyal the crown. To combat reintegration, local towns relied on a reemerged popular treason that worked alongside the statutory definitions. “An Old Whig” informed the readers of the *Newport Mercury* that “when men for their treason are banished from society, under a condition not to return until government shall be pleased to admit them” it became the responsibility of “every citizen to keep them at a distance” or expel them. In Philadelphia, the “Proceedings of the Freeman of the City” wanted to deny residence to those who “deserted their country in the hour of danger” and “prostituted” themselves in the effort to reduce America to slavery.<sup>62</sup>

Local committees relied on this understanding of treason to expel or otherwise disallow Loyalists to return. These committees considered returning Tories traitors because, by 1783, Loyalists had already cast their lot with the British. As a result, their treason made them unfit and untrustworthy for citizenship. Little did these committees know, but the problems they faced over allowing Loyalists into their communities, and subsequently acknowledging a Tory’s citizenship, paled in comparison to the decision Tories faced during the conflict of either joining the Patriots or remaining loyal to England.

It is difficult for historians to grasp fully the complexity and emotionalism behind the choice. Michael Kammen has been closer in explaining this predicament than any other scholar. Calling the selection a “*crise de conscience*,” Kammen notes that those

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<sup>62</sup> “An Old Whig,” April 30, 1783, in *Newport Mercury*, reprinted in *The Pennsylvania Packet*, May 24, 1783; “Proceedings of the Freeman of the city and Liberties of Philadelphia,” June 14, 1783, in *South Carolina Gazette*, July 8, 1783.

who were truly torn between England and America “suffered from psychic tensions.”<sup>63</sup>

Even on its most simplistic and macro level, the choice was one that came down to betraying and abandoning the nation, empire, and monarchy that many colonials had always known and celebrated or joining a revolution intended to sever the bonds that had connected colony to motherland and establish new modes of governing. But the issue was not that simple. Besides the larger concern of leaving England and starting a new nation, other, more personal matters factored into the decision such as relationships with friends and family and connections to local areas.<sup>64</sup> It is the decision people made on this level that turned the Revolution into more than just a defense of constitutionalism and ideology but also a civil war.

Choosing sides, however, was an extremely difficult one to make; so hard, in fact, that a large number of people throughout the conflict proclaimed neutrality. In the colony/state of New York the decision to remain neutral appeared to be among the hardest to make and became even more difficult once the British occupied New York City but struggled to subdue the country side.<sup>65</sup> Cadwalader Colden, Jr., the son of the colony’s Royal Governor, personified the predicament many confronted, not just in New York but throughout all the colonies. When questioned by New York’s Council of Safety

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<sup>63</sup> Kammen, “The American Revolution as a *Crise d Conscience*, 125-189, quote on 131.

<sup>64</sup> Clark, “The Problem of Allegiance in Revolutionary Poughkeepsie,” 285-318; Walter S. Dunn, *Choosing Sides on the Frontier in the American Revolution* (Westport, CT: Preger, 2007), 129-170; William H. Nelson, *The American Tory* (Boston: Beacon, 1961), 64-133.

<sup>65</sup> For New York, see Edward Countryman, *A People in Revolution: The American Revolution and Political Society in New York, 1760-1790* (New York: Norton, 1981), 103-160; E. Wilder Spaulding, *New York in the Critical Period, 1783-1789* (New York: Columbia University Press, 1932), 115-138; Philip Ranlet, *The New York Loyalists* (Knoxville: University of Tennessee Press, 1986); Alexander Flick, *Loyalism in New York during the American Revolution* (New York: Columbia University Press, 1901); Robert A. East and Jacob Judd, eds., *The Loyalists Americans: A Focus on Greater New York: Some New Perspective on the Adherents to the British Government and the Followers of the British Army Commonly called Tories who hoped for the Failure of the republic and a return to the Fold of the British Monarchy* (Tarrytown, NY: Sleepy Hollow Restorations, 1975).

as to the where his loyalties lie, Colden gave an uncertain and confused answer. He confessed that he would “ever look upon myself to be a faithful and true subject to that state from which I receive my protection” but that he was “bound by my oath to be a subject” to the king but since New York was an “independent government” he promised “to be a true and faithful subject” to the state as long as it remained independent.<sup>66</sup> In clearer terms, Colden believed himself to be a subject of the king but since he lived in New York he was also a subject of that state.

States responded to claim of neutrality such as that offered by Colden by flatly denying it as a legitimate choice. In an event as momentous and life changing as the Revolution, declaring that “who will Rule yet for the matter is not Determined,” was not good enough, sides had to taken.<sup>67</sup> To know which side people took in the war, most states relied on their committees of safety (or inspection) to administer oaths of allegiance or to note who refused. New York went further than any other state by creating in 1778 a “Commission for Detecting and Defeating Conspiracies.” This commission, which had county subsets, would take the oath of allegiance from its residents. In conjunction with the Commission, New York also enacted a measure to combat neutrality noting that many people in the state had “advocated the American cause till it became serious.” Many of these people, the June 30, 1778 act stated, suffered from a “poverty of spirit” which required legislation to force them to abandon their neutrality and select a side.<sup>68</sup> Nonetheless, some still attempted to maintain their neutrality. Beverley Robinson, the well-known businessman and partner of ardent

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<sup>66</sup> Quote taken from Kammen “*Crise d Conscience*,”166.

<sup>67</sup> Dorothy C. Barck, *Minutes of the Committee and of the First Commission for Detecting and Defeating Conspiracies in the State of New York* in *Collections of the New York History Society* 57 (1924), 149.

<sup>68</sup> The act can be found most conveniently in Paltsits, *Detecting and Defeating Conspiracies*, 2: 783-786.



Loyalist, Oliver De Lancey, proclaimed neutrality to the Commission and for his stance received a sharp rebuke from John Jay.

Sir, we have passed the Rubicon and it is now necessary every man Take his part. Cast off all allegiance to the king of Great Britain and take an oath of Allegiance to the States of America or Go over to the Enemy for we have Declared our Selves Independent.<sup>69</sup>

In the end, Robinson (as well as his son) remained loyal to England, going so far as to raising the Loyal American Regiment in New York City. For his loyalism, the New York legislature confiscated his property in a 1779 attainder measure.<sup>70</sup>

The best known Tory to weigh the problem of loyalties was Peter Van Schaack. One of John Jay's closest friends, Van Schaack was clearly torn between his relationship with Jay and other Patriots and his desire to remain loyal to England. In fact, during the imperial crisis years (1765-1775) he had actively supported the American resistance, believing English measures to be foolhardy and unconstitutional but not tyrannical. When resistance became revolution, however, he could not cross the Rubicon and support the American cause. As a result, the New York's provincial congress ordered him to leave the state. Before doing so, however, he eloquently voiced the dilemma many neutrals faced.

I hold it that *every individual* has still a right to choose the State of which he will become a member; for before he surrenders any part of his natural liberty, he as a right to know what security he will have for the enjoyment of the residue, and 'men being by nature, equal and independent,' the subjection of any one to the political power of a State, can arise only from 'his own consent.' I speak of the formation of society and of a man's initiating himself therein, so as to make

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<sup>69</sup> The episode is recorded in Richard B. Morris, ed., *John Jay: The Making a Revolutionary, Unpublished Papers, 1745-1780* (New York: Harper & Row, 1975), 345-349.

<sup>70</sup> *Ibid.*, 346.

himself a member of it; for I admit, that when once the society *is* formed, the majority of its members undoubtedly conclude the rest.<sup>71</sup>

Jay's remarks to Robinson and Van Schaack's declaration that individuals had the right to choose their allegiance epitomized what historian James Kettner calls "volitional allegiance."<sup>72</sup> That individuals would make their own decision of where their allegiances lay corresponded with the revolutionary American idea that government was based on the consent of the governed. If someone refused to consent to the government being formed, they had the right to remove themselves from that government and ally themselves with another. This idea of choosing sides, and in the case of the Loyalists, selecting England over America, formed the core of the civil war aspect of the Revolution. As will be shown, "volitional allegiance" emerged as a critical element of Loyalist reintegration.

The new state governments recognized the need for volitional allegiance by allowing an interim period for people to make their selection. Given the difficulty of the choice, Patriot governments offered a rather long and lenient period of grace in which to render that decision. In the various proclamations or acts of pardon and grace issued throughout the Revolution, nearly all gave some period of time to those subjected to the measure to determine if they would take advantage of the measure. Also, given the poor traveling conditions and lack of fast communications, this extended period furnished

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<sup>71</sup> Peter Van Schaack, "Letter to the Convention," January 25, 1777, in Schaack, ed., *The Life of Peter Van Schaack*, 73. Emphasis is Van Schaack's. Also see Van Schaack's poignant letter to John Jay in *ibid.*, 121-126. Two other good works on Van Schaack are William Allen Benton, *Whig-Loyalism: an Aspect of Political Ideology in the American Revolutionary Era* (Rutherford, NJ: Fairleigh Dickinson University Press, 1969), 155-189, and Carl Becker, "John Jay and Peter Van Schaack," *The Quarterly Journal of the New York State Historical Association* 1 (Oct. 1919), reprinted in *New York History* 50 (Oct. 1969): 441-454.

<sup>72</sup> James H. Kettner, *The Development of American Citizenship, 1608-1877* (Chapel Hill: University of North Carolina Press, 1977), 173-209.

people ample time to swear the oath. It also explains, in part, why Americans rejected any notion of neutrality.

Two other sources, treason legislation and treason trials, both stressed the importance of a time period selecting allegiances. That treason legislation and trials should acknowledge a period of selection should not be surprising since it was legally impossible to commit treason against a state to whom allegiance was not owed. From these two sources, most states appeared to have made one of two periods from which to select allegiance. The first, and most common period, started with the approval of the Declaration of Independence to the enactment of a state's treason legislation. The second and less commonly noted period began with the initial military engagements of Lexington and Concord, April 19, 1775, to the passing of treason measures.<sup>73</sup> With the Declaration of Independence the connection with Great Britain was formally severed thus forcing the issue of whether to remain loyal to the crown or take the risk of the revolution succeeding. And with the initiation of violence serving as the starting point was reasonable as once word of the battles spread, choosing sides became paramount. If anything, by making the battles of Lexington and Concord as the key selection point provided an even longer time for people to make up their minds. Ending the period through the enactment of treason laws should be fairly self-evident, as once these laws were passed, the selection had already been made.

The trial of Samuel Chapman, as noted earlier, was one of the best examples of the importance of a period of selection and its repercussions for individuals and states.

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<sup>73</sup> Pennsylvania and Connecticut, for example, used July 4 as the date while Massachusetts and Georgia relied on April 19, 1775. North Carolina appears not to have had a set day, thus allowing a near indefinite period of selection. See *Bayard v. Singleton* (North Carolina, Supreme Court, 1787).

Chapman was a native of Pennsylvania and on December 26, 1777, he joined the British army where he manned a British warship. On June 18, 1778, the state's Executive Council issued an attainder against him and when the time elapsed to turn himself in, he was charged with high treason. Chapman pleaded his case before the Pennsylvania Supreme Court in 1781.<sup>74</sup>

At issue was the status of Chapman's allegiance: was he a citizen of Pennsylvania or a subject of King George III? The answer to this question determined whether Chapman could be punished according to Pennsylvania's treason statute. The case had larger repercussions as well. If Chapman's innocence was upheld and he was considered a subject of George III instead of a citizen of Pennsylvania, it was possible that other Loyalists could claim they never swore allegiance to a state and thus rely upon the case as a precedent to assist them in their claims for compensation from the British or recovering debts and lost property as it did in at least one post-war case.<sup>75</sup>

Chapman's defense attorney asserted that when his client left the state in later December of 1776 Pennsylvania lacked an established government. Because of this, no allegiance could be declared nor could the state claim to protect its citizen. "Perpetual allegiance," Chapman argued, "applies only to established and settled governments." Since the Commonwealth was neither established nor settled, "every member of the community has a right of election, to resort to which he pleases; and even after the new system is formed, he is entitled to express his dissent" and join another nation. Because Chapman chose England and did so before Pennsylvania's new state legislature passed

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<sup>74</sup> *Pennsylvania v. Chapman*, in Dallas, ed. *Reports and Cases*, 1: 53-60; Kettner, *Development of American Citizenship*, 195-197.

<sup>75</sup> That case was *McIlvaine v. Coxe* 2 Cranch 280-283 (U.S. 1805).

any legislation, any attainder for treason against him was illegal and represented an *ex post facto* prosecution.<sup>76</sup>

Pennsylvania's Attorney General replied by citing a litany of examples, starting with the Declaration of Independence, demonstrating how the former proprietary colony was indeed a commonwealth by the time Chapman departed. The most important evidence of Pennsylvania's status as a sovereign state was the adoption of its constitution in September of 1776, a full three months before Chapman joined the British. While it was true that practically no legislation passed the state's assembly, despite having met in November, it ultimately did not matter. The state's constitution, the Attorney General argued, was "that social compact under which the people of this State are now united," that made Chapman a citizen. Finally, the prosecution offered to the court that Joseph Galloway and others who joined the British in the fall of 1776, before Chapman's departure, were considered "subjects of Pennsylvania" and were subsequently punished as such.<sup>77</sup>

McKean's charge to the jury, which, in reported form, was longer than the defense and prosecutions arguments combined, clearly favored Chapman's defense.<sup>78</sup> Again showing the importance of judges in defining the scope of treason, the Chief Justice defined treason as "nothing more than a criminal attempt to destroy the existence of government." Noting that a state of civil war existed in Pennsylvania, McKean agreed with the defense that "every man chuses [sic] his party" and that all people possess the right to remove themselves into another country. A "reasonable time for that purpose

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<sup>76</sup> *Pennsylvania v. Chapin*, 53-54.

<sup>77</sup> *Ibid.*, 54-55.

<sup>78</sup> *Ibid.*

ought to be allowed” he informed the jury, although a court and jury were perhaps the best arbiters of what a ‘reasonable time” meant in cases like Chapman’s where a fluid situation existed. While joining the enemy of a country during a war was an act of treason, McKean posited that this was not Chapman’s situation. As Pennsylvania was in civil war at the time of Chapman’s leaving, he simply could not have committed treason as no established government was being betrayed. The jury agreed with McKean’s interpretation and found Chapman not guilty of treason.<sup>79</sup>

### **Development of American Citizenship**

While a period of selection was offered during the Revolution, after the war no such interlude existed. By the arrival of the preliminary Treaty of Peace in early 1783, few state legislatures were in a forgiving mood and even fewer communities were willing, at first, to consider making fellow citizens out of loyal subjects of England. Article five of the Treaty of Peace added only anger and confusion to the situation as it was unclear to most who were the “real British subjects” mentioned in the article.<sup>80</sup> The American peace delegation, however, explained to the Congress (which was then transmitted to the states) that they understood the term to mean only those “Subjects of Britian whose only *Particular* Interest in America consisted in holding Lands and Property there.”<sup>81</sup> Their recommendation fell on deaf ears because, as was true with much of the Loyalist clauses of the treaty, and the states decided for themselves to interpret the phrase. Thus, in hopes of barring any return of Loyalists, several state

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<sup>79</sup> *Ibid.*, 55-60.

<sup>80</sup> Robert Livingston to the Peace Commissioners, March 25, 1783, in Wharton, *Revolutionary Diplomatic Correspondence*, 6: 338.

<sup>81</sup> Wharton, *Revolutionary Diplomatic Correspondence*, 6: 569; Virginia Delegation to Benjamin Harrison, October 4, 1783, in William T. Hutchinson, *The Papers of James Madison*, 17 vols. (Chicago: University of Chicago Press, 1962-1991), 7: 367-371.

legislatures attempted to define who the “real British subjects” were by enacting new citizenship legislation that identified in rather narrow terms who could be a citizen. Three states in particular, Virginia, South Carolina, and New York all attempted and battled over post-war citizenship.

Throughout 1783, the Virginia legislature considered a new citizenship bill to replace its 1779 measure. The genesis for the new bill came in 1782 when a number of petitions seeking pardons for treason convictions reached the Virginia legislature. When British merchants and Loyalists returned to the state, hoping to secure payments for their debts or sought permanent residence, they only compounded the problem. Throughout 1782 and 1783, the Virginia legislature received petitions seeking citizenship in the commonwealth sparking an angry outcry and counter-petitions from towns and communities and even a proclamation from Governor Benjamin Harrison forbidding any Loyalist or British merchant from entering the state.<sup>82</sup> While some of the pardons for treason were granted, particularly in 1782 before the inflammatory articles of the peace treaty, throughout the state many came to believe or re-assert their belief that citizenship in a republican society was a privilege.<sup>83</sup> Many also feared that admitting “those who have evermore inclined to bow to the yoke of slavery [i.e. the British] than to assist in the establishment of American independence” as citizens could influence the heavily indebted planters to a more anti-republican leanings.<sup>84</sup> While worrying about the

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<sup>82</sup> These petitions can be found in the Virginia Legislative Petitions, State Library of Virginia; Harrison, “A Proclamation,” July 2, 1783, in *The Virginia Gazette*.

<sup>83</sup> Mathews to Thomas Nelson, July 7, 1781, in Palmer, *Virginia State Papers*, 2: 207; Colonel John Syme to the Governor, January 9, 1782, Colonel L. Wood, Jr. to the Governor, February 8, 1782, William Reynolds to the Governor, December 17, 1782, Palmer, *Virginia State Papers*, 3: 12, 56, 251, 400; *House of Delegates*, October Session, *passim*. Also see “A Sentinel from Caroline County” in *Virginia Gazette*, November 8, 1783.

potential influence of returning Loyalists seems far-fetched in 1783, with the revolutionary war just over and events still unsettled, this fear became tangible.

Virginia's attempt to define citizenship and thus curb any post-war return of Tories began in May, when Patrick Henry, supported by rival Richard Henry Lee, actually proposed the repealing of Virginia's war-time laws that prohibited Loyalist migration into the state. Opposition to Henry's bill, which was great both in and out of the legislative halls, focused both on the lack of support for Loyalist reintegration and the indiscriminate nature of the measure which allowed essentially any Loyalist to enter, no matter what role they played in the revolution. Postponing the bill until its October session, opposition to the bill became intense.<sup>84</sup> John Tyler, normally an ally of Henry's in the legislature, spoke for many when he argued against re-admittance for those Loyalists who actively worked against Virginian and American independence. Henry, who defended the measure with his characteristic vigor and eloquence, expressed "no objection to the return of those deluded people – they have to be sure mistaken their own interests . . . and have suffered the punishment." The war was over and the opportunity presented itself to "lay aside our antipathies and prejudices" and welcome all "enterprising, moneyed people." Henry dismissed the fears of those who fretted over the

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<sup>84</sup> Quote from Isaac Harrell, *Loyalism in Virginia: Chapters in the Economic History of the Revolution* (New York: AMS Press, 1926), 138.

<sup>85</sup> William Wirt Henry, *Patrick Henry: Life, Correspondence, and Speeches*, 3 vols. (New York: Charles Scribner and Sons, 1891), 2: 191-192; Joseph Jones to James Madison, May 31, 1783, and June 8, 1783, in William T. Hutchinson, ed., *The Papers of James Madison* 10 vols. (Chicago: University of Chicago Press, 19 -), 7: 99-101, 119-121 (the June 8 letter mentions a petition from Essex against the bill); Virginia House of Delegates, *Journal*, May 1783: 19, 21; Harrell, *Loyalism in Virginia*, 139 n94; Norman Risjord, *Chesapeake Politics, 1781-1800* (New York: Columbia University Press, 1978), 202. Risjord's study, while in depth, only glosses over Loyalist reintegration, thus failing to note the important and long term effect to the political, legal, and social aspect of reassimilation.



potential machinations of former Loyalists and merchants. “Shall *we*,” he boasted, “who have laid the proud British *lion* at our feet, now be afraid of his whelps?”<sup>86</sup>

Yet, for all of Henry’s bluster, he was unable to secure the majority needed to pass his bill. After much wrangling and parliamentary maneuvering, the Virginia legislature compromised.<sup>87</sup> The first aspect of the compromise repealed the 1779 measure and allowed any foreign born subject to become a citizen upon taking an oath of allegiance. If the person held any position or received a pension from their home government, they were ineligible for office. The measure also provided mechanisms for renouncing allegiance to the state. The second compromise measure denied citizenship to anyone who, before April 1775, resided in any colony – not just Virginia – and joined the British or severed on the New York Board of Refugees. Loyalists not fitting these descriptions and not otherwise banned from the state through previous legislation were allowed to return except they were not, however, “capable of voting for members of either house of assembly, or exercising or of holding any office or trust or profit, civil or military.”<sup>88</sup> Thus, Virginia legislated for only a particular type of Loyalist to seek citizenship: those whose loyalism was inactive and essentially incidental throughout the entire conflict. Even then, Virginia punished their loyalty by stripping them of their political rights.

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<sup>86</sup> Henry, *Life, Correspondence, and Speeches*, 195-196. Risjord argues that Henry switched positions on his own bill in the fall session. I have found no evidence to support this claim nor does Risjord cite any. Risjord, *Chesapeake Politics*, 202.

<sup>87</sup> Joseph Jones to James Monroe, November 28, 1783, and December 6, 1783, in Daniel Preston, ed., *The Papers of James Monroe: Selected Correspondence and Papers, 1776-1794* 2 vols. (Westport: Greenwood Press, 2006), 2: 66-70.

<sup>88</sup> “An Act for the Admission of Emigrants and Declaring Their Rights to Citizenship” and “An Act Prohibiting the Migration of Certain Persons to this Commonwealth, and for Other Purposes” Hening, *Statutes of Virginia*, 11: 322-325, quote on 325.

In South Carolina and New York, the question of whether former Loyalists should receive citizenship became an even more contentious issue. The problem was not only whether returning or remaining Tories could receive citizenship, but more important the status of those Patriots who remained in the British-occupied cities of Charleston and New York City. Since these people appeared to have consciously chosen to remain in the city, or in some cases moved to the British occupied cities for protection from two warring armies, most South Carolinians and New Yorkers considered them traitors and, subsequently, British subjects.<sup>89</sup>

Separate statutes passed by these two states reflected this thinking. When South Carolina's Assembly of that state met in 1782, soon after the British evacuation of Charleston, it undertook measures against Loyalists and residents who lived in the city during the occupation. The Amercement Act of 1782 stated that anyone who had accepted British rule of the city after its capture in May, 1780, and had not signed Governor Rutledge's pardon would be amerced twelve percent of their property value.<sup>90</sup> Adding insult to injury, the Assembly allowed only English merchants to plea against banishment and confiscation. While South Carolina did not outright deny citizenship to Loyalists or American refugees, it made certain that some stringent – although not brutal – punishment would be handed out .

The situation in New York was very similar to that in South Carolina. In 1784, New York denied the petition of numbers Loyalists seeking re-admittance as citizens.

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<sup>89</sup> For an excellent discussion of garrison-town Loyalists and the problem of reintegration, see Timothy M. Barnes and Robert Calhoon, "Loyalist Discourse and the Moderation of the American Revolution" in Robert M. Calhoon, Timothy M. Barnes, and Robert S. Davis, *The Loyalist Perception and Other Essays*, 2<sup>nd</sup> ed. (Columbia: University of South Carolina Press, forthcoming).

<sup>90</sup> *South Carolina Statutes at Large*, IV: 523-525.

Not only this, but the state passed “An Act to Preserve the Freedom and Independence of this State” which denied political office for anyone who served in any faculty within the British military; while this aspect of the bill was not drastic, the bill also stripped the privilege for any Patriot who lived behind British lines after July 9, 1776 – the day New York accepted the Declaration of Independence.<sup>91</sup> The measure only denied citizenship in a backhanded way; in essence what the New York legislature declared was that anyone – no matter if they actually supported for the Revolutions – who even appeared an English supporter, would be considered a subject of Britain. The New York Council of Revision originally vetoed the legislation on grounds that the bill violated “principles of justice” and the New York constitution by establishing a board of inspectors and superintendents of election who would determine the status (either Whig or Tory) and eligibility of the voter. Tellingly, the Council did not object to denying citizenship to those who lived in British lines suggesting that they had little problem with citizenship aspects of the measure. The New York assembly overrode the Council’s veto by “more than two Thirds of the Members present.”<sup>92</sup>

Many New Yorkers took pleasure in the passing of the measure, but it was Isaac Ledyard’s “Mentor” essay that best expressed the sentiments of those wishing to see some punishment meted out to remaining Loyalists and their supposed American collaborators. Written before the passage of the “Act to Preserve the Freedom and Independence” of the state, “Mentor” distinguished between the “Real British Subjects” and traitors. Those New Yorkers who lived under British rule during the war were not

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<sup>91</sup> *Laws of the Legislature of New York in Force against the Loyalists* (London: H. Reynell, 1786), 112-116.

<sup>92</sup> *Journal of the New York Assembly*, May 10, 1784, 166-167. At the same time, the Assembly overrode another of the Council’s veto, this time on a bill that allowed for the selling of confiscated property.

aliens; neither the Treaty of Peace nor New York law recognized them as such, Ledyard argued. Rather, “instead of aliens, I would render them traitors, and as such, put the penal laws in force against them.” By not punishing these people, moreover, “Mentor” feared “the principle of sedition in its foundation” would remain in the state.<sup>93</sup> Ledyard’s fears must have been shared by the New York legislature and a driving force behind essentially denying citizenship to remaining Loyalists and American refugees.

While it appeared that proponents of denying citizenship to Loyalist and American residents of occupied cities had the upper hand, strong opposition existed and worked against the proponents in those same states. In South Carolina, Aedanus Burke’s, “Address to the Freeman of South Carolina,” worked against the both the Exclusion and Amercement Acts. As previously noted, Burke’s arguments focused on the illiberal and arbitrary nature of the measures. But he also blasted the two measures and the anger the legislature directed at those Americans who remained in Charleston after the British conquered the city. Those who stayed in Charleston, he asserted, “did nothing more than their duty in taking protection and if they thought they could secure better treatment, or alleviate their calamity by congratulations, they had an undoubted right to do it.” This group should not be punished “for neither law nor government existed” for them to abandon or betray since the South Carolina government fled when the British invaded. Furthermore, those who remained in Charleston were captured in defense of the city and “bore hunger, insults and persecution” of the British. Citing authorities on the Law of Nations, particularly Pufendorf, Grotius, and Vattel, Burke asserted that once the British evacuated the city, the rights and freedoms of those who

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<sup>93</sup> Isaac Ledyard, “Mentor’s Reply to Phocion’s Letter with Observations on Trade, Addressed to the Citizens of New York” (New York: Shepard Kollock, 1784), 7, 10.

lived under British occupation would be restored once more. It would be the same, he wrote,” as those who were detained prisoners of war, or took refuge to the northward.” Ultimately, instead of denying political rights, the forcing of arbitrary fines, and general treatment as “miscreants,” the legislature should pass an act of pardon and oblivion to quell the passions of civil war.<sup>94</sup>

For all its learning, or because of it, Burke’s argument sounded more like an extended legal brief than an attempt at persuasion. As was so often the case in the public debate over reintegrating Loyalists, it was Alexander Hamilton and his “Second Letter from Phocion,” that made the most forceful and persuasive argument against denying citizenship to Loyalists and American refugees. Written in response to Ledyard’s “Mentor” essay (which itself was an answer to the first Phocion letter), Hamilton hammered away at Mentor and the legislative attempt to deny citizenship. Hamilton laid out five points in an attempt to explain why New Yorkers who lived behind British rule should not be denied citizenship. Three of the points, (two-four) discussed the need for due process, the definition of the word crime, and the burdensome need for prosecutions to ascertain whether a crime (i.e. treason) had been committed. Although all five points dealt directly with the impropriety of denying citizenship to New Yorkers behind British lines, the most powerful and persuasive parts were the first and last point: that “no man can forfeit or be justly deprived, without his consent” and one could not be a citizen for purposes of punishment but not one in terms of privileges [i.e. voting]. It was these bookended points, moreover, that established the foundation of his argument.<sup>95</sup>

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<sup>94</sup> Aedanus Burke, “An Address to the Freemen of the State of South-Carolina,” (Philadelphia: Robert Bell, 1783), 1-32, quotes on 7, 16, and 9.

<sup>95</sup> Alexander Hamilton, “Second Letter from Phocion,” in Hamilton, *Papers*, 3: 530-558.

To defend and explain his argument, Hamilton relied heavily upon the idea of volitional allegiance. The Declaration of Independence, the New Yorker claimed, provided the impetus for people to select either withdrawing themselves from the state or remaining loyal to Britain or join the new independent government. “It was the policy of the Revolution,” he continued, “to inculcate upon every citizen the obligation of renouncing his habitation, property, and even private concern with the service of his country.” As such, those New Yorkers who remained in the state “were to be considered as citizens, owing allegiance to the new government.” This idea was the “principle . . . upon which all the measures of our public councils have been grounded.” Because New Yorkers in the southern part of the state (the area under British control) purposely decided in favor of the American cause they were “as much citizens of the state as the inhabitants of other parts of it” and continued to be even under the British occupation. Only outside forces, such as British occupation, the forfeiting of their citizenship own accord, being purposely left out of the formation of the state, or “having been dismembered by [the] treaty” of peace.<sup>96</sup> By depriving the rights and privileges of citizenship to those who remained in a British occupied city “convert[ed] misfortune into guilt.”<sup>97</sup> The first phase of Hamilton’s argument for equal citizenship ended with his plea to end the “indiscriminate guilt” placed upon those who remained with their property and livelihoods. In the second and more important phase, Hamilton moved his discussion to the relationship between the actual status of those living behind British lines and the Treaty of Peace.

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<sup>96</sup> *Ibid.*, 533.

<sup>97</sup> *Ibid.*, 534.

Remaining behind English military lines did not naturally transfer allegiance to the conqueror, Hamilton maintained. He admitted that some remaining may have had an “interested part with the enemy,” which could have possibly opened them up to treason charges, yet Hamilton believed this could not have happened for three reasons. First, a changed status from citizen to alien would have erased any potential treason charges since aliens cannot commit treason against a foreign state (i.e. New York). Second, “taking part against the state” because of living in an enemy-occupied area was “altogether of new-invention, unknown and inadmissible in law, and contrary to the nature of the social compact.” The third reason why living under occupation could not lead to treason was that the Treaty of Peace forbade it. Ascertaining whether a citizen of New York actually committed treason against the state instead of simply residing under the occupation required a criminal prosecution. Article six of the treaty, Hamilton reminded his readers, prohibited prosecutions against any one for the part they had taken in the war. By establishing an arbitrary line that made anyone living below the mark at least an alien and, at worst, a traitor would “be to measure innocence and guilt, by latitude and longitude.”<sup>98</sup>

These people were further protected, Hamilton contended, by the treaty’s fifth article. The treaty distinguished between “real British subjects” and those which just happened to live under occupation. Real British subjects were those like Governor Tyron and Dunmore, the last royal governors of New York. These people were never “subjects of this country before or after the revolution, but were “truly been subjects of Great-

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<sup>98</sup> *Ibid.*, 535.

Britain.”<sup>99</sup> The second clause of the treaty purposely discussed those “persons resident in districts in the possession on his Majesty's arms and who have not borne arms against the said United States.”<sup>100</sup> This clause, Hamilton pointed out, meant that someone “either is or is not a subject of a country” because “if they were only factious or pretended British subjects,” because they temporarily lived under the rule of a foreign power, “they must be real American subjects; or in other words, if they were not real British subjects, which by necessary implication they are declared not to be, they must of necessity be American subjects.”<sup>101</sup> Conclusively, Hamilton stated that “there is nothing in the terms of the treaty . . . that those who have been within the British lines are considered and stipulated for as aliens.”<sup>102</sup>

Burke and Hamilton marshaled strong evidence in their legal arguments but their efforts did not lead to the repeal of their state's measures, making the acts just like the other post-war anti-Loyalists measures. Virginia, South Carolina, and New York were not the only states that attempted to declare who were the “real British subjects.” Pennsylvania, as noted elsewhere, maintained its strenuous war-time Test Act, not repealing it until 1786. Because the state waited so long to revise the measure a large number of Quakers – many of whom supported the Revolution (although, according to their beliefs, they remained pacifists) – remained unable to obtain citizenship because they could not swear the oath required by the law.<sup>103</sup> Massachusetts enacted legislation

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<sup>99</sup> *Ibid.*, 536-537.

<sup>100</sup> Article Five of the Treaty of Peace.

<sup>101</sup> Hamilton, “Second Phocion,” 536.

<sup>102</sup> *Ibid.*, 539.

<sup>103</sup> *Pennsylvania General Assembly*, February 4, 1784, and September 9, 15, 16, 22, 23 (Philadelphia: Hall and Sellers, 1784), 114, 164-165, 324-325, 334-336, 345, 349-350. Also see Robert L. Brunhouse, *The Counter-Revolution in Pennsylvania, 1776-1790* (Harrisburg: Pennsylvania Historical Commission, 1942), 15-16, 161-164.



to “expel such Aliens as may be dangerous to the peace and good Order of Government.” The measure disallowed reentry for anyone who supported England up to the point of the Treaty of Peace unless they obtained a special license from the Governor.<sup>104</sup> Although the effectiveness of the laws may not have been as strong as intended by the legislature’s intended – particularly in South Carolina which did not gain as much revenue from confiscation and amercement as it anticipated – the measures did designate Loyalists and some Americans as less than full citizens.<sup>105</sup>

Further weakening the efficacy of these measures and the attempts to deny residence to returning Loyalists were the former Tories actively seeking citizenship. In every state, petitions flooded state legislatures seeking approval for citizenship. While the Virginia legislature considered denying full citizenship to returning Loyalists it also considered a number of citizenship petitions from returning Loyalists. In New York, even while considering and overriding the Council of Revision veto, the legislature formed *ad hoc* committees to review Loyalist request for citizenship. The Massachusetts General Court considered each petition on a point by point basis. During the legislative sessions of 1783-1784 the South Carolina legislature, even after punishing Loyalists and those who remained in Charleston during the occupation, considered 122 petitions for citizenship. While this number may appear low, for both sessions the House of

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<sup>104</sup> Massachusetts, “An Act for Repealing Two Laws of this State, and for Asserting the Right of this Free and Sovereign Commonwealth to Expel such Aliens as may be dangerous to the peace and good Order of Government” in *Collection of Acts of Laws passed in the State of Massachusetts Bay Relative to the American Loyalists and Their Property*, (London: John Stockdale, 1785), 26-29.

<sup>105</sup> Robert S. Lambert, *South Carolina Loyalists in the American Revolution* (Columbia: University of South Carolina Press, 1987), 234-235.

Representatives received 571 petitions, thus citizenship petitions accounted for just a little over twenty percent of the total number of petitions.<sup>106</sup>

It would be an oversimplification to state that the petitions seeking citizenship derived solely from Loyalists wishing to reintegrate. While a large number of them did, a noticeable amount also came from other former members of the British Empire, particularly British merchants who had some pre-war contact with the former colonies. In some cases, these merchants sought citizenship for no other reason than to break down the legal barriers that prohibited the collection of pre-war debts.<sup>107</sup> Yet, most of petitions originated from Loyalists from those Loyalists who returned or stayed read similar to the petition of Mark Walkman to the South Carolina House of Representatives:

The Humble Petition of Mark Walkman Sheweth, That your Petitioner now confined in the Provost of this Town, was formerly an Inhabitant of this Tate, and left the same in the year, one thousand seven hundred and seventy eight; That Previous to his going away an Act was passed by the Legislature obliging all personal to take a test oath or oath of fidelity and allegiance to the State, and personas refusing to take the same were ordered by the said act to depart in a certain time.

Your Petitioner being then and Officer in the Customs was obliged to quit this Country in compliance with the above mentioned Law; but he begs leave to assure the Honourable House that it was with reluctance and regret that he did it, and the only motive which induced him to do so was to get the money which the Crown was indebted to him for his Salary. That your petitioner never was guilty of any one transaction tending to the injury or prejudice of any person or person, Subject of the united States of America, but on all occasions assisted them in getting out their goods and Person, which an be proved by many in this Town

That your petition most ardently and Sincerely wished to become a Subject of this State, and therefore begs leave to throw himself on the mercy of the Legislature, and Prays that he may be liberated from his present confinement, and be permitted to the liberties and Privileges of a Citizen.<sup>108</sup>

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<sup>106</sup> Theodora J. Thompson, ed., *Journals of the House of Representatives, 1783-1784* (Columbia: University of South Carolina Press, 1977), *passim* [hereafter, South Carolina, *House of Representatives*].

<sup>107</sup> Archibald Maclaine to George Hooper, June 9, 1783, in Clark, ed., *State Records of North Carolina*, 16: 964-965. Maclaine advised his son-in-law, a British merchant, that to collect his debt he could have to "become a citizen of South Carolina."

<sup>108</sup> Petition of Mark Walkman to the South Carolina House of Representatives, February 10, 1783, in *ibid.*, 113.

The petitions from Loyalists seeking citizenship raised a critical question: why did returning Tories seek legislative acknowledgement of their citizenship? Legal, political, and social reasons explain these petitions. First, all states laws required anyone who sought citizenship could only obtain it via the legislative process. Assimilating Loyalists had no legal choice but to seek a legislative sanction for actual citizenship. Yet, petitioning the state governments also carried a political burden. Since Loyalists, through their very nature of being originally against the Patriots, had no access to the levers of power. Petitioning served as practically the only method Loyalists had to exercise any political control over their future. But these reasons, while obviously important, were minor compared to the social meaning of obtaining legal citizenry. If these petitions are viewed in terms of social importance they demonstrate several critical aspects of reintegration. First, just petitioning the legislature for citizenship was, for the Loyalist, an act of contrition. The act demonstrated to the state and community how former Tories repented their former loyalism and now sought redemption by acknowledging their sin and prostrating themselves before the legislature. Along with seeking forgiveness, these petitions for citizenship attempted to demonstrate the desire of returning Loyalists to live peacefully. The post-war petitions did the opposite of what the wartime treason legislation did: whereas treason laws helped solidify a Loyalist identity by singling out which people were Loyalists and thus incapable of being members of the new republics. Requesting citizenship, however, demonstrated the former Loyalist's decision to cast off his old identity as a subject of England and create a new one as a citizen of a state and member of the new nation.

In the immediate post-war period of 1783-1784, the state legislatures conferred citizenship upon a number of returning Loyalists. New York's "Act to Preserve the Freedom and Independence" that Hamilton opposed, contained a provision granting citizenship to twenty-seven returning Loyalists. Virginia granted citizenship to a number of those who petitioned the legislature. Other states followed by passing private laws granting citizenship upon returning Loyalists.<sup>109</sup> States appeared more than ready to embrace James Iredell's suggestion "that no Man in a civil war is justly censurable for anything but insincerity in chusing his side, or in fidelity in adhering to it, or in the course of his political conduct deviating in any instance from principles of humanity and virtue." States did not grant citizenship simply because a returning Loyalist petitioned for it.<sup>110</sup> Rather the states discriminated in their granting of citizenship by allowing those, as Samuel Adams put it, who "would be useful & good citizens." Most who received the sanctioning were often Loyalists who did little more than side with the British in the war and took no active part in resisting American independence. This policy of allowing non active Tories to become citizens applied to exiled Loyalists too as the cases of Samuel Curwen and Henry and Peter Van Schaack demonstrate, all of whom were granted citizenship in the immediate post war years. But if a Loyalist was "highly dangerous" because of having worked against the American cause either in a civil or military manner, any attempt at citizenship was denied.<sup>111</sup> In 1789 Joseph Galloway petitioned the Pennsylvania Executive Council for citizenship into the Commonwealth. Although

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<sup>109</sup> Kettner, *Development of American Citizenship*, 213-247. For examples of private laws granting citizenship see Clark, ed. *State Records of North Carolina*, 24, *passim*.

<sup>110</sup> James Iredell to Archibald Neilson, June 15, 1784, in Don Higginbotham and Donna Kelly, ed., *The Papers of James Iredell*, 3 vols. (Raleigh: Office of Archives and History, North Carolina Department of Cultural Resources, 2003), 3: 67-68.

<sup>111</sup> Both quotes from Samuel Adams to John Adams, April 16, 1784 in Harry Alonzo Cushing, ed. *The Writings of Samuel Adams* 4 vols. (New York: G. P. Putnman and Sons, 1908) 4: 295.

the exact exchange has been lost, the minutes of the Council's meeting make it very clear that because of his connections and counseling to members of the British government and his role in the occupation of Philadelphia during the war, he had little chance of ever obtaining citizenship. As a result, he withdrew his petition for citizenship.<sup>112</sup>

Discriminating the Loyalists based on their actions was not a hard and fast rule, however. Many Loyalists who were active against the Americans eventually received citizenship. Massachusetts voted citizenship for militant Loyalist Isaac Winslow, while denying Nicholas Brattle's request for citizenship despite a large outpouring of support from a variety of sources including the Rhode Island Governor and Assembly.<sup>113</sup> North Carolina refused to grant some Loyalist merchants citizenship, including Thomas Hooper, the son-in-law of one of the state's leaders, Archibald McClaine, while admitting others who took up arms against the state.<sup>114</sup> Other states sometime struggled in determining who to admit or deny citizenship. Yet, the critical point was that throughout the entire Confederation period states could determine who to admit as citizens. When this fact is coupled with the changing American attitudes towards both individual rights versus the community and the meaning and nature of the law, returning Loyalists were granted citizenship and were reintegrated into the American polity.

The influences of federalism, ideology, and constitutionalism in the granting of citizenship to former Loyalists, while of absolute importance, does not tell the complete story as to why the states conferred the privilege upon some returning Tories. The

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<sup>112</sup> *Colonial Records of Pennsylvania*, 16: 363.

<sup>113</sup> Mass, "Return of the Massachusetts Loyalists," 442.

<sup>114</sup> Maass, "Complicated Scene of Difficulties," 424. Hooper's attempts to obtain citizenship in North Carolina citizenship can be found in the numerous correspondence between Hooper and McClaine in Clark, *State Records of North Carolina*, 16, *passim*.

changing idea of allegiance made the granting of citizenship a little easier. Put differently, former Loyalists were aided in their transition to citizen because of American understanding and acceptance in the differences in allegiance between subjectship and citizenship.

In medieval and early modern England, allegiance was directly linked to the monarchy instead of the nation and served as the source of unity for the far flung reaches of the realm. As historian Gordon Wood notes, the allegiance to the monarch contained “all sorts of social, cultural, and even psychological implications.”<sup>115</sup> Foremost among these implications was the dependent nature of a monarchial-based allegiance. In theory, Subjects to the king were to be subordinate, lacking any sort of self-agency but at the same time the relationship between king and subject was believed to be personal and intimate. In this subject-king relationship, the monarch assumed some responsibilities, particularly the role of care-taker. William Blackstone, in his distillation of the common law, expressed the commonly held idea that the king served “as the *pater-familias* of the nation; to whom it appertains by his regal office to protect the community.”<sup>116</sup> Because the monarch was supposed to be the protector of his “family,” it became the duty of his subjects to owe their allegiance to him, thereby creating a symbiotic association. The great seventeenth century jurist, Sir Edward Coke, summed up this reciprocal relationship in his famous opinion in *Calvin’s Case*. As Coke reported, “the subject oweth to the king

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<sup>115</sup> Gordon Wood, *Radicalism of the American Revolution*, (New York: Knopf, 1991), 11.

<sup>116</sup> Blackstone, *Commentaries*, 4: 127. For secondary works on this point, see Gordon J. Schochet, *Patriarchalism in Political Thought: The Authoritarian Family and Political Speculation and Attitudes Especially in Seventeenth-Century England* (New York: Basic Books, 1975); Jerrilynn G. Marston, “Gentry Honor and Royalism in Early Stuart England,” *Journal of British Studies* 13 (1973): 21-43; Daniel J. Huselbosch, “The Ancient Constitution and the Expanding Empire: Sir Edward Coke’s British Jurisprudence,” *Law and History* 21 (Fall 2003): 439-482; Polly Price, “Natural Law and Birthright Citizenship in *Calvin’s Case* (1608),” *Yale Journal of Law and the Humanities* 9 (1997): 73-146; Kettner, *Development of American Citizenship*,

his true and faithfully ligeance and obedience, so the sovereign is to govern and protect his subjects.”<sup>117</sup>

Coke’s dictum found a welcome home in eighteenth-century colonial America. Before the Revolution colonial Americans embraced their status as English subjects and actually took pride in the position. Even during the imperial crisis and in the first year of the war, colonial Americans went to great pains to note their loyalty to the English king.<sup>118</sup> But when American independence became the cause of the Revolution and republican governments created, the idea of allegiance changed with them. No longer were residents of the thirteen states subjects of the English crown; rather they were now republican citizens, which just like the monarchical subjection, carried its own set of assumptions most of which were at odds with an allegiance to a king.

With the embracing of republicanism and creation of republican states, the development of what citizenship meant went hand in hand. Gone was the idea of a people being dependent upon the monarch for protection and thus owing their allegiance to him. Rather, the notion that equality was “the life and soul of Commonwealth” meant that all the members of society had equal sharing by being both governors and the governed with allegiance being owed to the state because the state was composed of the

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<sup>117</sup> Calvin’s Case in Sheppard, ed, *The Selected Writings of Sir Edward Coke*, 1: 166-232.

<sup>118</sup> James Wilson, “Considerations on the Nature and Extent of the Legislative Authority of the British Parliament,” (Philadelphia: William and Thomas Bradford, 1774); John Adams, “Novanglus,” in C. Bradley Thompson, ed., *The Revolutionary Writings of John Adams* (Indianapolis: Liberty Fund, 2000), 242; Kettner, *Development of American Citizenship*, 131-172; Wood, *Radicalism of the American Revolution*, 162-163; Gerald Stourzh, *Alexander Hamilton and the Idea of Republican Government* (Stanford: University of Stanford Press, 1970), 41. More recently, Brendan McConville, *The Kings Three Faces: The Rise and Fall of Royal America, 1688-1776* (Chapel Hill: University of North Carolina Press, 2006), has argued that colonial Americans were significantly more celebratory of the monarchy that historians have previously contended.

people.<sup>119</sup> David Ramsay, the South Carolinian physician and historian, gave more thought in explaining the difference between subjection and citizenship than perhaps any other American. He articulated the distinction in his 1789 “Dissertation on the Manner of Acquiring the Character and Privileges of a Citizen of the United States.” The Revolution, he noted, radically changed “principle of government” from a monarchy to a republic but just as important “the political character of the people was also changed.” Even the word subject, Ramsay noted, was derived from *sub* and *jecio*, meaning that that one was “under the authority of another.” Thus subjects of a Monarch “look up to a master.” Citizenship, however, is “an unit of a mass of free people, who, collectively, possess sovereignty.” As such, no “hereditary rights superior to others” exists to extract – either through fear or love – allegiance.<sup>120</sup>

This fundamental, and even radical, change between subject and citizen assisted the Loyalists in their attempts to redeem themselves and be welcomed back. Those Loyalists who petitioned for citizenship announced to the state and community their acceptance of this new republican reality of citizenship and were willing to become part of it. For state legislatures, the petitions for citizenship served a similar purpose. While it acknowledged that Loyalists exercised volitional allegiance by making the conscious decision to reside in the newly independent state (and country), the petition was a clear demonstration that Loyalists had been, or were well on their way, to be being rehabilitated and made equal citizens. The same is true for those Loyalists who returned but were never granted citizenship. While they may have lived under the new republican

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<sup>119</sup> Quote is from David Ramsay, “On Oration” July 4, 1779, in Robert Brunhouse, ed., “David Ramsay, 1749-1815, Selections from His Writings,” *Transactions of the American Philosophical Society* 55 (1964): 182-190.

<sup>120</sup> David Ramsay, “A Dissertation on the Manner of Acquiring the Character and Privileges of a Citizen of the United States” (n.p.: n.p. 1789), 1-8, quote on 2.



governments, the stain of their treason, which was never fully erased because they were not full citizens, stigmatized them for the rest of their lives as Pennsylvania's "Black List" demonstrated.

Treason, allegiance, and citizenship were all complicated social and legal processes before the American Revolution. Attempting to gain independence only further complicated the situation as Loyalists faced the decision to either remain loyal to England or join the rebellion. If Loyalists kept their allegiance to England, the new state governments declared this loyalty to England as treason and enacted a whole host of measures intended to make Loyalists' actions traitors. This treason carried with it a serious social stigma, which declared that person untrustworthy and incapable of being a true American. For a number of reasons, however, Loyalists, on the whole, did not face excessive punishment for their treason, although a large number lost their property and were exiled. After the war, a number of the Loyalists who wished to return petitioned the state legislatures seeking citizenship. A number of states struggled to determine if former traitors should receive the privilege; both the states and reintegrating Loyalists were aided in their decisions by the shifting conceptual change from subjectship to citizenship. By embracing the new republican understanding of what citizenship meant through their petitioning and returning, Loyalists could demonstrate their sincerity in casting off their former identities as Britons and accepting their new lives as Americans. This sincerity, in turn, assisted the states in recognizing that their former enemies had been rehabilitated into fellow citizens.

## Chapter 8

### Afterword:

#### Reintegration in Historical Memory

In a recent essay on the relationship between the Revolutionary War and state formation, Don Higginbotham noted that “Loyalist issues were, with the exception of debates over paper money and other debtor matter, the most hot button items in domestic politics between 1783 and 1787.”<sup>1</sup> Oddly enough, most historians who have studied the post war period have failed to notice the issue of Loyalist reintegration, let alone that it was one of the critical issues of the decade. Several reasons explain this rather large oversight. Most historians who study the immediate post-war years do so with an eye towards the Philadelphia Convention or in explaining a social and political conflict between debtors and creditors. These studies assume, or imply, that Loyalist reintegration was either a temporary moment of intensity which cooled quickly or too insignificant to distract attention away from matters of national importance.

A third and generally unnoticed reason also explains this lack of attention: Loyalists were successfully reintegrated. This dissertation has focused on the difficulty of this process yet so successfully were Loyalists reintegrated that it has faded from the national conscience in ways other key issues of post-war America, such as Shays rebellion and the Virginia Statute of Religious Freedom, have not. Thus, the lack of historical memory on reintegration is reflected in the paucity of studies on the topic especially when compared to the embarrassment of riches on the Revolutionary era.

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<sup>1</sup> Don Higginbotham, “War and State Formation in Revolutionary America” in Peter Onuf and Eliga Gould, eds., *Empire and Nation: The American Revolution in the Atlantic World* (Baltimore: The Johns Hopkins University Press, 2005), 66-67.

Forgetting that any reintegration occurred began almost as soon as the Loyalists were assimilated, as reflected in the unfavorable reputation of the Loyalists in the politics and literature of the first several decades of the early Republic. The American references to Loyalists during this period echoed the Revolutionaries' charges that they were supporters of tyranny. Such perceptions completely glossed over any mention that many Loyalists actually returned and settled in the new country, living their lives in peace and quiet.

In the political battles between Federalists and Republicans in the 1790s, rivals sometimes labeled their opponents Tories in the hopes that the electorate would believe that candidate to be a hidden monarchist who cared little for republican principles. One of Thomas Jefferson's favorite epitaphs for the Federalists was branding them Tories, and, by the end of the decade, he believed that a significant number of Federalists were originally Loyalists during the Revolution.<sup>2</sup> In the early nineteenth century as war with England became a potential in the first years of James Madison's presidency, Nathaniel Whittaker's Revolutionary period sermons that had warned that the dangers and "rewards of Toryism" were republished in the hopes that the "black unprincipled conduct of the Tories" would be passed down to "generations yet unborn" in order that they "may know from what source have sprang those innumerable evils which now exist."<sup>3</sup>

Assisting in this negative remembrance of the Loyalists were the initial interpretations of the Revolution. Written by participants or witnesses of the struggle

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<sup>2</sup> For use of "Tory" as a negative moniker against political opponents, see Howard B. Rock, "The American Revolution and the Mechanics of New York City: One Generation Later," *New York History* 57 (July 1976): 380-386. On Jefferson's belief that the Federalists were former Loyalists, see Dumas Malone, *Jefferson and the Ordeal of Liberty* (Boston: Little, Brown, and Company, 1962), 364-365.

<sup>3</sup> "The Publisher's Note," Nathaniel Whittaker "The Antidote Against and the Reward of Toryism being Two Sermons Preached at the Tabernacle Church, in Salem, One at the Commencement, and the Other at the Close of the Revolutionary War," 2<sup>nd</sup> edition (Salem: Pool and Palfray, 1811).

these works castigated the Loyalists as traitors to their country and generally portrayed them as the colonial political leaders and sycophants of the Crown who sought the scraps of patronage. Although this interpretation should not be surprising since it flowed from the pens of American participants, all of whom genuinely believed the Revolution to be a popular uprising against tyranny; nonetheless, their descriptions of Tories helped shaped the American memory of the Loyalists.<sup>4</sup> Of all the early historians of the Revolution, three stand out as particularly noteworthy: Mercy Otis Warren, William Gordon, and David Ramsay.

Of these three historians, Warren – sister of the famous revolutionary James Otis and wife of leading Patriot, James Warren – heaped the greatest scorn upon the Loyalists. Her template for describing Tories was her favorite target of malice, Thomas Hutchinson, the last royal governor of Massachusetts. In Warren's *History of the Rise, Progress, and Termination of the American Revolution*, Hutchinson, and the King's Friends in general, were the apostles of Machiavelli and tyrants in the image of George III. Politically, Warren contended that he was "dark, intriguing, insinuating, haughty, and ambitious, while the extreme of avarice marked every feature of his character."<sup>5</sup> It was these characteristics which drove the Tory support of the King's attempt to make political slaves out his American subjects, and only through the virtuous, self-sacrificing actions were Patriot Americans able to defend liberty.

The personal indignation that permeated Warren's view of the Loyalists was not present in the works of William Gordon and David Ramsay, although both were certainly

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<sup>4</sup> Bernard Bailyn, "The Losers: Notes on the Historiography of Loyalists" in *The Ordeal of Thomas Hutchinson* (Cambridge: Harvard University Press, 1974), 383 [hereafter cited *Ordeal of Thomas Hutchinson*].

<sup>5</sup> Mercy Otis Warren, *History of the Rise, Progress, and Termination of the American Revolution*, 3 vols. (Boston: n.p., 1803; reprint, Indianapolis: Liberty Fund, 1983), 1: 79.

critical of the Tories. Gordon, an English-born minister who came to Massachusetts and became a Patriot supporter, viewed the Loyalists as traitors to their homeland, and, like Warren, saved his strongest criticism for Governor Hutchinson. There was a difference, however, between Warren and Gordon's portrayal of the beleaguered governor. Where Warren based her contempt for Hutchinson exclusively on personality, Gordon's condemnation – and, really, his importance to Loyalist historiography – rested upon letters and other manuscripts he collected throughout the 1780s. Gordon based his critique of Hutchinson upon the correspondence between the Governor and Massachusetts Chief Justice, Peter Oliver. In these letters, Hutchinson claimed that American liberty needed to be tempered. Gordon asserted that because of Hutchinson's alleged belief in the curtailment of liberty “the name of Gov. Hutchinson . . . [will be] delivered down to posterity . . . loaded with infamy.”<sup>6</sup> Once again, the Loyalists, by using Hutchinson writ large, were viewed as tyrants whose actions justified revolution and independence.

By far the most complex analysis that emerged from this first phase of Loyalist interpretations was that of David Ramsay. Unlike most of his contemporary commentators, Ramsay did not rely upon Hutchinson or any other individual Loyalist to explain them or their motivation. Instead, he relied upon a sophisticated generation-gap thesis. As he noted in his *History of the American Revolution*, “the age and temperament of individuals had, often, an influence in fixing their political character. Old men were seldom warm Whigs. They could not relish the great changes, which were daily taking

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<sup>6</sup> William Gordon, *History of the Rise, Progress, and Establishment of the Independence of the United States of America* .... 4 vols. (London: n.p., 1785), 2: 28-33.

place. Attached to ancient forms and habits, they could not readily accommodate themselves to new systems.”<sup>7</sup> Thus, they could not support American independence.

To be sure, Ramsay was no friend of the Loyalists, believing that once the War started many of them worked from the darkest of motivations, such as greed and self-interest. But he did not level the damning accusations that often marked early accounts of the Revolution. In fact, compared to Warren’s blistering condemnation of loyalists, Ramsay’s criticism was incredibly mild and even left the impression that he had at least attempted to understand why they opposed the Revolution. He was the only chronicler to mention, albeit briefly in one paragraph, the opposition in America to their return and castigated some of the abuse these returnees faced believing that some of it was excessive.<sup>8</sup> To Ramsay, the Loyalists were not tyrants (although they were beholden to a tyrannical regime) nor participants of in Machiavellian machinations. Instead, many were “friends to peace, and lovers of justice.” Despite his more moderate stance towards the Loyalists, in his final analysis, however, Ramsay kept true to the general idea of the Loyalists, namely that they were politicians already in power, owing their position to the crown and as such feared severing ties with Britain would result in a loss of personal power. They were, he noted “those who were in possession or expectation of royal favor, or of promotion from Great Britain” which caused them to betray their homeland in pursuit of self-seeking interest and aggrandizement.<sup>9</sup>

Ramsay’s work was the best historical account of the Revolution from his generation. Yet, his more moderate view of the Loyalists, which ultimately still believed

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<sup>7</sup> David Ramsay, *History of the American Revolution*, 2 vols. (London, n.p., 1793; reprint, Indianapolis: Liberty Fund, 1990), 2: 314.

<sup>8</sup> *Ibid.*, 393.

<sup>9</sup> *Ibid.*, 314.

them to be traitors, did not become the standard assessment of the Loyalists. Rather, Warren's harsh, acerbic understanding of the loyalists became the standard interpretation. Furthermore, the early interpretations of Loyalists, as one recent scholar has noted, "denied [their] identity as Americans, for it made American identity contingent on allegiance to revolutionary ideals."<sup>10</sup> To all early chroniclers of Revolution, therefore, since the Loyalists rejected revolution and betrayed their country, they could never be considered Americans. Of course, this denying of Loyalists of any American identity was contingent upon a denial that many of them actually returned and resettled peacefully.

What the early historical studies started in their lack of remembrance of reintegration was furthered in early nineteenth-century American literature. Here, too, Loyalists remained those figures who supported George III over American liberty. One can see this in the episode of Washington Irving's classic tale of Rip Van Winkle. After waking from his twenty-year slumber, Van Winkle walked to the local tavern where a sign featuring George III had once hung above its entrance and in its place was an image of someone Van Winkle did not recognize, George Washington. When he entered the establishment, he thought the people themselves had seemed different, busy and boisterous instead of the calm atmosphere with which he was familiar. Instead of his friends sitting around smoking pipes, these newer customers were talking about liberty, Congresses, and revolutions. When the crowd took notice of Van Winkle, someone asked him which side he favored, Federalist or Democrat. The befuddled old man replied

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<sup>10</sup> Eileen Ka-May Cheng, "American Historical Writers and the Loyalists, 1788-1856: Dissent, Consensus, and American Nationality" in *Journal of the Early Republic* 24 (Winter, 2003): 495. Cheng rightfully includes Ramsay in this analysis, yet she fails to note that his work is considerably more understanding of the Loyalists than that of his contemporaries.

he was “a poor quiet man, a native of the place, and a loyal subject of the king, God bless him!” The crowd erupted in anger “A Tory! a Tory! a spy! a refugee! hustle him! away with him!” Luckily for Van Winkle, order was restored before any action could be taken against him. Although it could be said with some validity that Van Winkle was reintegrated into his fictional New York society, Irving also made a subtle point in his tale regarding the rejection of Loyalists as part of the new American society. Later in the story, as Van Winkle has learned of great events that transpired in his long sleep, he began to reestablish his friendships with his old friends, who were, themselves, former loyal subjects of the King. Soon, however, Irving has the old man preferring to make friends “among the rising generation, with whom he soon grew into great favor.” Thus what Irving implied was that the new republican way of life as exemplified by the younger generation that Van Winkle attached himself to was more preferable to the hoary days of loyalty to the British Crown, as personified in Van Winkle’s “former cronies, though all rather the worse for the wear and tear of time.”<sup>11</sup>

Although Irving’s use of the historical memory of the Loyalists was somewhat obtuse, the same could not be said for the writings of James Fenimore Cooper and William Gilmore Simms, both of whom made Loyalists central figures in some of their novels. In Cooper’s *The Spy* and Simms’s, *The Partisan*, the Loyalists were portrayed as vicious marauders who scour the New York and South Carolina countryside looking for their next Patriot victim.<sup>12</sup> In *The Spy*, these villainous vagabonds were the real-life

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<sup>11</sup> Washington Irving, “Rip Van Winkle,” in *The Sketch-Book of Geoffrey Crayon, Gent.* (1819; reprint: New York: Maynard, Merrill, and Company, 1880), 50-76, quotes on 68, 73.

<sup>12</sup> James Fenimore Cooper, *The Spy* (1821; reprinted New York: Penguin Group, 1997); William Gilmore Simms, *The Partisan: A Romance of the Revolution* 2 vols. (New York: Harper and Brothers, 1835). For the DeLancey Cowboys, see Catherine Crary, “Guerilla Activities of James DeLancey’s Cowboys in Westchester County: Conventional Warfare or Self-Interested Freebooting,” in Robert A. East and Jacob Judd, eds., *The Loyalists Americans: A Focus on Greater New York* (Tarrytown, NY: Sleepy Hollow



“DeLancey Cowboys,” a group of Tory refugees who terrorized the Westchester, New York frontier during the War, while in *The Partisan* it was various militia troops of “banditi.” How these two groups brought terror to their enemies was best described by Simms:

Banding together in small squads, the dissolute and wicked among the citizens, native and adopted, thus availed themselves . . . to revenge themselves upon old enemies, destroy the property they could not appropriate, and, with the sword and rope, punish the more honest, or the more quiet, for that pacific forbearance which they themselves were so little dispossessed to manifest. . . . The tory became the British ally, and the whig his victim accordingly; and to such a degree were the atrocities of these wretches carried, that men were dragged from the arms of their wives at midnight, and suffered for their love of country in the sight of wife and children by dying the rope, and from their own roof-trees.<sup>13</sup>

With such powerful descriptions, however based on half-truths they might have been, it is little wonder that reintegration fell from memory while the Loyalist-as-villain remained. Thus, through the historical fictions of Cooper and Simms, the Loyalists were not the old and no longer threatening men of by-gone times as in Irving’s “Rip Van Winkle,” but were, rather, the despised murderers and terrorists of Patriots and worthy of scorn.

The natural question that arises from this historical amnesia about reintegration but persistence negativity toward Loyalists was how did integrated Loyalists react to these political and literary portrayals of their positions during the Revolution? The answer is simple: they did not react to it. Sarah Purcell has stated in her recent study on the development of the American memory on the Revolution that Loyalist’s “keeping quiet was essential to being reaccepted into American society.”<sup>14</sup> The only initial American remembrances of the Tories after the Revolution came from the political taunts

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Restorations, 1975), 14-24; and, for Simms, see Sean Busick, *A Sober Desire for History: William Gilmore Simms as Historian* (Columbia: University of South Carolina Press, 2005).

<sup>13</sup> Simms, *The Partisan*, 2: 129.

<sup>14</sup> Sarah Purcell, *Sealed with Blood: War, Sacrifice, and Memory in Revolutionary America* (Philadelphia: University of Pennsylvania Press, 2002), 70.

and literature of Patriots. A number of those Loyalists who moved to Canada or other places within the Empire published some accounts of their lives; former Loyalists in America, however, made no attempt in trying to explain their former positions. Nor have historians attempted to explain why. Perhaps, many of the Loyalists viewed their silence as the price of their reintegration, the pound of flesh they had to sacrifice for being left alone. Or maybe they feared a new round of coercion and punishment if a large number of them protested the negative portrayal of themselves or relatives. Possibly, and more likely, they did not draw attention to their former Loyalism in order to prevent reopening wounds long since healed. Also plausible, they may have been flippant about these works and not have cared or paid attention to these interpretations as they lived their daily lives as Americans. Whether from fear or indifference, by keeping quiet, these former Tories gave some acquiescence to the creation of this American memory of Loyalists.

Yet, perhaps this early national understanding of the Loyalists, which emphasized the wartime activities and ignored any mention that some re-entered American society, was a natural by-product of American's memories of the Revolution. As the Revolution became romanticized and perceived in the simplistic terms of the forces of republican liberty versus the tyranny of monarchy and empire, the idea that Loyalists were the violent and virtueless supporters of oppression should not be surprising.<sup>15</sup> After all, if the Loyalists were supposed to be the domestic losers of the war, what would it say about the Revolution if many went from Loyalists in war to Americans in peace?

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<sup>15</sup> Andrew Burnstein, *Sentimental Democracy: The Evolution of America's Self-Image* (New York: Hill and Wang, 1999); and Peter C. Hoffer, *Revolution and Regeneration: Life Cycle and the Historical Vision of the Generation of 1776* (Athens: University of Georgia Press, 1983).

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